HASS AVOCADO PROMOTION, ARCH, AND INFORMATION ACT OF 1999

HEARING

BEFORE THE

SUBCOMMITTEE ON LIVESTOCK AND HORTICULTURE

OF THE

OMMITTEE ON AGRICULTURE

IOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

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ON

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THE HASS AVOCADO PROMOTION, RESEARCH AND INFORMATION ACT OF 1999

THURSDAY, APRIL 13, 2000

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LIVESTOCK AND HORTICULTURE,
COMMITTEE ON AGRICULTURE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:12 a.m., in room 1300, Longworth House Office Building, Hon. Richard W. Pombo (chairman of the subcommittee) presiding.

Present: Representatives Goodlatte, Everett, Hostettler, Calvert, Gutknecht, Riley, Peterson, Condit, Dooley, Berry, McIntyre, Stabenow, Etheridge, Boswell, and Lucas of Kentucky.

Staff present: Christopher D'Arcy, staff director, Subcommittee on Livestock and Horticulture; Wanda Worsham, chief clerk; R. Bryan Daniel, Brent Gattis, Callista Bisek, Andy Johnson, and Andy Baker.

OPENING STATEMENT OF HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. POMBO. We are going to call this hearing to order. This meeting of the Subcommittee on Livestock and Horticulture to receive testimony, on the review of H.R. 2962, the Hass Avocado Promotion Research and Information Act of 1999, will come to order. I would like to welcome our first panel here this morning to testify on the legislation. Mr. Charlie Wolk, chairman of the California Avocado Commission who is accompanied by Mr. Tom Bellamore, and Mr. Michael McLeod. We also have Mr. David Holzworth, who is the U.S. general counsel for the Chilean Exporters Association, Chilean Fresh Fruit Association. I welcome you all here this morning for this hearing on this very important legislation.

If there are any statements for the record, they may be included at this point in the record.

[The prepared statement of Messrs. Cunningham and Calvert follow:]

PREPARED STATEMENT OF HON. RANDY "DUKE" CUNNINGHAM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Chairman Pombo, Ranking Member Peterson, members of the subcommittee, I want to join my colleagues here today in strong support of the Hass Avocado Promotion, Research and Information Act of 2000 (H.R. 2962).

This legislation will establish a Federal promotion program for Hass avocados that is paid by growers and importers who benefit most by increased avocado sales.

The program will not be financed by American taxpayers. There is no better way for us to help our farmers then to give them the tools they need to help themselves.

San Diego's North County, which includes my district, is the No. 1 avocado producing area in America. And avocados have had a tremendous impact on our community's customs and culture. The section of Interstate 15 that runs north from my Escondido district office is called the "Avocado Highway" because of the "forests" of avocado trees that you can see as you drive along. One of the most frequent quotes you will hear in San Diego's North County this Earth Day will be "Trees Supply Oxygen. Really Good Trees Supply Oxygen and Avocados."

And Americans love avocados. On most of our national holidays and celebrations, such as the Fourth of July, Cinco de Mayo, Memorial Day, Labor Day, and Super Bowl Sunday, Americans make and enjoy the most popular use of the avocado—guacamole.

Now while I could share with you my favorite avocado recipes, this hearing is about a promotional marketing program. California has had a successful avocado marketing program for 20 years. However, recent changes to the American avocado market, and imports from Mexico, have created the need for a Federal promotion program.

This legislation will establish a self-help promotion program to provide California's 6,000 Hass avocado growers, and hundreds of international importers, a level playing field to share as partners in developing the American market for avocados.

It establishes a 12-member Hass Avocado Board to administer the funds collected under this Act. Both domestic growers and importers of Hass avocados will be represented on this board, which will distribute funds for several important common purposes:

- to conduct new activities for generic advertising and promotion of avocados,
- to develop new markets,
- and to perform research on the sale, distribution, use, quality and nutritional value of avocados.

The bill establishes a process by which Hass avocado farmers and growers could assess upon themselves, through a checkoff program used by many other agricultural producers, a fee for avocado research and marketing programs. Upon approval by Congress and a majority vote by farmers and importers, the bill would establish an initial assessment of 2½ cents per pound on both domestic producers and importers. It would raise about $10 million annually. This funding will preserve and strengthen the economic viability of the entire avocado market, including producers and others who market, process, and consume Hass avocados.

Mr. Chairman, members of this subcommittee, I urge you to support this legislation.

Let us give our growers and importers the tools they need to expand our Nation's avocado market. As a long time consumer and supporter of California's avocado growers, I look forward to working with you to pass this important legislation.

PREPARED STATEMENT OF HON. KEN CALVERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

I am pleased to present the Hass Avocado Promotion, Research and Information Act to this subcommittee. This legislation will provide California's 6,000 Hass avocado growers—who produce all of the Hass avocados grown in the United States—with a new self-help mechanism to enhance their national marketing efforts.

This act will allow avocado growers to fund and operate a coordinated marketing effort to expand domestic and foreign markets. The maintenance and expansion of existing markets and the development of new markets for Hass avocados, is critical to preserving and strengthening the economic viability of the domestic avocado industry for the benefit of growers, and others who market, process and consume Hass avocados.

The legislation will not be funded by tax dollars—the bill simply creates a mechanism for Hass avocado growers to assess themselves. In addition, importers of Hass avocados into the United States would participate in the funding plan by paying the same assessment as U.S. growers. Thus, importers would pay their fair share in helping to expand the consumer market from which they already benefit. At present, the national marketing of avocados is paid entirely by California avocado growers through assessments collected by the California Avocado Commission.

The Commission, which was originally established under California State law in 1978, operates a highly successful national promotion program that has steadily improved the position of avocados in the U.S. market. In 1988, an estimated 32 percent of U.S. households bought fresh avocados compared to 41 percent in 1995—a growth well beyond the increase in number of U.S. households. Avocados have held

their attraction numbers at 40 percent or more in U.S. households, but a very solid market development effort by California growers at the consumer level may not be adequate to offset the onslaught of ever-increasing Hass avocado imports.

Without an expanded national avocado promotion program, imports will continue to supply a larger share of the U.S. avocado market, and undermine U.S. production. However, this bill offers a "win-win" proposition to domestic growers and importers, who can work in partnership to increase the market for avocados and avocado products.

The bill contains an up-front referendum, so avocado growers have a voting process to formally decide whether to implement this new national promotion program. In this referendum, growers and importers will determine whether they choose to assess themselves 2½ cents per pound to create a promotion program that reaches a larger consumer audience. The funds generated by this legislation will be administered by a 12-member Hass Avocado Board that would be comprised of both domestic grower and importer representatives.

California Hass avocado growers found it necessary to ask Congress to enact enabling legislation to tailor a promotion program that meets their unique circumstance that all the commercial Hass production in the United States occurring in one single state, and the levels of imports are escalating. They examined the generic promotion provisions contained in the 1996 farm bill and determined that the language of the bill was defective in placing the assessment on first handlers rather than the assessment being paid by the producer, and collected and remitted by the first handler.

Furthermore, it was apparent that the existing, fully operational commodity promotion programs have their own unique authorizing statue. It made sense to craft implementing legislation in order to continue to make use of a successful State-administered nationwide promotion program, and to ensure that importers pay their fair share of the cost of promoting their product in the U.S. market. As a result, today we are considering H.R. 2962, as revised to accommodate many of the suggested changes recommended by USDA's Agricultural Marketing Service.

The Hass Avocado Promotion Act will build demand for Hass avocados at a time when the domestic industry is facing challenges and change. With imports increasing rapidly, new demand is needed to maintain market stability and value. As pointed out in the testimony provided by the General Counsel for the Chilean Fresh Fruit Association, the Chileans openly admit and "anticipates that the U.S. market share of Chilean Hass avocados will increase in the next few years." The Chileans also tout the phenomenal growth of its fruit and vegetable exports to the United States. These points clearly underscore the need for this Agriculture Committee to ensure that importers pay the same assessment that our own U.S. growers have been willing to pay for years.

There is a serious crisis in farm country that demands our immediate attention. We in Congress need to be responsive in these difficult times. I am happy to offer this legislation aimed at avocados that is cosponsored by my California colleague Representative Gary Condit.

I ask my colleagues on this subcommittee for their support in advancing this vital legislation for Hass avocado growers and California agriculture.

Mr. POMBO. I would like to start with Mr. Wolk if you are ready. We would like you to contain your oral remarks to 5 minutes. Your entire testimony will be included in the record. You may begin.

STATEMENT OF CHARLEY WOLK, CHAIRMAN, CALIFORNIA AVOCADO COMMISSION

Mr. WOLK. Thank you, Mr. Chairman, and members of the subcommittee. On behalf of the California 6,000 avocado growers in the California Avocado Commission, I wish first to commend the staff of this subcommittee and other Committee on Agriculture members, especially Representative Calvert and Representative Condit, who have worked very hard in the last 8 months in crafting the provision of the bill. The bill will create a national promotion order that will be funded by all the parties that benefit from the sale of Hass avocados in the U.S. domestic market. I think it is important to note that, as you know, avocados are not a subsidized crop and with the ever-increasing imports coming into our domestic

market, this bill will provide a mechanism so that everyone who benefits is able to pay for the development of the market.

You know that there are other commodities that already have programs: beef, cotton, dairy, eggs, fluid, milk, soybeans, pork, honey, mushrooms, and watermelon already have a mechanism to build consumer demand, and we are asking the Congress to give us the same opportunity to build that demand in the marketplace, again, because the ever-increasing entry of imported production from offshore into the market.

California has a long history of having grower-funded programs for market development and the Avocado Commission is one of them, and we are very, very proud of the record of what we have accomplished in building consumer demand with value.

But the offshore supplies again are increasing. There is, in 1998, the last year we have data on, offshore entry into the market was about 100 million pounds, essentially about one third of the California crop. And again, we believe that a national promotion order will enable to put in place the mechanisms to build consumer demand, and that it will be shared fairly by all producers, including those offshore.

The avocados are enjoyed essentially throughout the country. They are part of a healthy diet and again, if there is not a maintenance and a building of demand, the economic viability of the marketplace will deteriorate to the demise of both California producers and offshore producers.

The key elements of the bill will have a 12-member board. It will be representatives of both domestic producers and importers. It will make provisions for developing new advertising and promotion programs. Also, it has the ability to conduct research on sale distribution and nutritional value of avocados. It will have an up-front referendum for both producers and importers and an initial assessment rate will be 2½ cents per pound.

Again, this would give us a pooled resource so that we have the critical mass in order to be able to conduct a successful program. There has been question of why we didn't choose to have the generic program and essentially, it is two points. Number one, the generic legislation provides that the assessment would be paid by the first handlers as opposed to the other programs where the assessment is paid by the producers or the importers and the handlers are only the collection agency. If the handlers pay the money, then they end up having the votes on board.

The other thing is that the program would be written by the Secretary of Agriculture with a possibility without true regard for what the growers and the producers wanted to have in their program.

Essentially, when our commissioners looked at the alternative of using the generic act was just not appropriate for our needs, and as you know, all the commodities fight for a share of the consumer stomach. We need this program to, again, to muster the resources so that all of the people benefitting from domestic sales of Hass avocados, which are produced only commercially in California. Everybody has got to pay, and I might, in closing, that in actuality, when you look at the marketplace, the provisions, so that everybody pays is actually in the best interest of the two major importers into the

U.S. market now, Chile and the Mexican producers. Again, I ask for your support in passing this bill to give us the tools we need to protect the market.

[The prepared statement of Mr. Wolk appears at the conclusion of the hearing.]

Mr. POMBO. Thank you. Mr. Holzworth.

STATEMENT OF DAVID A. HOLZWORTH, U.S. GENERAL COUNSEL, CHILEAN EXPORTERS ASSOCIATION AND THE CHILEAN FRESH FRUIT ASSOCIATION

Mr. HOLZWORTH. Thank you, Mr. Chairman, members of the subcommittee, for this opportunity to testify on behalf of the Chilean Exporters Association and its promotional arm here in the United States, based in Sacramento, CA, Chilean Fresh Fruit Association.

I think there is much that the producers and exporters from Chile have in common with the producers of Hass avocados in California, and other parts of the United States, although predominantly in California. Chile and California share a great many things, including very similar climates, complementary growing seasons, that is, winter in Chile when it is summer in California and vice versa, and this similarity of climates and complementarity of growing seasons has allowed for some interesting developments in the fruit markets over the last few years.

We have had substantial experience with promoting Chilean fruit worldwide, not only in the United States, and the complementarity of the seasons has worked well in creating a continuity of supply in the marketplace that has benefited both the producers from the southern hemisphere as well as the producers from North America. All of the promotional efforts of the Chilean Exporters Association and the Chilean Growers have been voluntary and they have been voluntary generally in cooperation with producers in the United States. There has been a tremendous development, for example, in the sale and consumption of table grapes from California and Chile that has been enhanced by the complementarity of the growing seasons and the coordination of certain efforts, all voluntary among the groups.

Likewise, there has been a tremendous increase in kiwi production and consumption in the United States, and again, this has resulted from cooperative, not mandatory, efforts between the two countries and their shippers and handlers.

We are opposed to the current version of House bill 2962, because we think the mandatory approach to it will not give the benefits, promotional benefits, that can be obtained through voluntary cooperation between the producers and growers and exporters in Chile and their counterparts in California, and the reason why is that H.R. 2962, as it is presently drafted raises substantial concerns of fairness and substantial trade concerns, including whether it is compliant with WTO.

We would strongly urge that if the mandatory approach is to be taken that the legislation more appropriate is the generic legislation because of the procedural safeguards that it contains. We don't have any concerns, in particular, about the current California Avocado Commission, but we do not know 3, 5, 10 years from now, whether the commission will be constituted, the same people and

the same members and the whole point of having procedural safeguards in a mandatory program is to assure that through time that there won't be any misuse or undue dominance of a board by any particular group, and for this reason there are very substantial safeguards written into the generic legislation that we do not see in the current version of the proposal by the California Avocado Commission.

Where were those procedural safeguards to be taken into account? I think there might be some basis for discussion between the growers in Chile and in California on how best to implement. The trends have shown that the production, in fact, increasing from outside the United States and the total volume consumed in the United States of Hass avocado in the next 3 to 5 years is more likely than not to be the majority of it being produced from overseas. That would mean that there would be a majority volume coming from overseas, but the board contained or constituted by H.R. 2962 would still be dominated and controlled exclusively by domestic producers.

We think that raises substantial trade concerns. We are not however opposed to looking into a cooperative effort and to working with the California Avocado Commission, and this committee to design legislation that will meet the important procedural safeguards that we think need to be applied.

I am certainly open to any questions from the committee, and I thank you again for the opportunity to testify here today.

Mr. POMBO. Thank you.

[The prepared statement of Mr. Holzworth appears at the conclusion of the hearing.]

Mr. POMBO. I thank the panel for their testimony. I would like to recognize the chief sponsor of the legislation, Mr. Calvert, for his questions.

Mr. CALVERT. Thank you, Mr. Chairman, and thank you for holding this hearing today.

Mr. Wolk, Mr. Holzworth just stated in his testimony that the Chilean importers believe that voluntary contributions to a promotion program rather than mandatory assessments are the best way to achieve the overall objective of promoting and increasing avocado sales. I find that kind of hard to believe because we have a problem called the "free rider syndrome." I kind of like "voluntary." This weekend I am going to have to fill out my income tax and send in a check. I wish we could vote on a voluntary income tax. I will be there for you, Mr. Chairman, I know you will be there for me too. But I find that difficult that you are going to get universal appeal out of that, whether or not people are going to contribute or not. There is really no reason to chip in, isn't that true, Mr. Wolk, if you have a free rider problem in a voluntary contribution program? Do you have any comment about that?

Mr. WOLK. Yes, I do. First of all, just for background, I have been president of the California Food Growers Association, and we attempted to get a State marketing order in order to do essentially the same thing, get everybody to contribute and we did it on a voluntary basis to get it started, and I was very frustrated personally to find growers, and some of them, substantial growers in sweet persimmons would compliment the association on the job they were

doing. And when I asked them if they wanted to join in with us to help support market development, they would just laugh and said no, why should I, you all are doing it yourself, so I am not going to play.

It is the same thing that we have had from other offshore producers. The Chileans had offered to make a voluntary contribution, but the California growers, our budget this year is $14 million, and people want to talk about doing a smaller number, and we cannot get the critical mass, not only in my personal judgment and in the judgment of the other commissioners, without mandatory contributions from everyone who benefits from the U.S. market.

Mr. CALVERT. Obviously, it is clear to me why this bill is important to the California 6,000 avocado growers, but I would like to follow up. If you could provide this subcommittee with some greater insight into California growers, who came to the conclusion that a new national Hass Avocado Promotion Program was vital to the future of the U.S. avocado industry, why do you think this is such a vital thing?

Mr. WOLK. I have been involved with the Avocado Commission for over 20 years about, and we had years when the California crop was very near what we have product available in the marketplace now. And it just simply will not sustain itself without more resources being expanded and directed to expand the marketplace, expand the demand. We have one very nice thing in the market in that we don't have a saturated market. There is plenty of market potential in the domestic market. It is just that we don't have enough resources.

Mr. CALVERT. Thank you. Thank you, Mr. Chairman.

Mr. POMBO. The chief cosponsor of the legislation, Mr. Condit.

Mr. CONDIT. Thank you, Mr. Chairman. First of all, let me thank the panel for being here this morning and all the work they have done on that. I would like to, if I can, zero in on Mr. Holzworth and your comments based on your statement that assessment on imports would be unconstitutional under the Chilean law. Are you suggesting that Chile is challenging all existing promotional programs that assess imports?

Mr. HOLZWORTH. We have had a great deal of experience in working with the California Kiwi Fruit Commission, for example, over the last 4 or 5 years under a similar check-off program. One of the concerns that rises from the point of view of Chile is that because it is a very definitely free-market, oriented country, mandatory programs do raise constitutional problems in Chile in terms of compliance. It is an unresolved issue.

We prefer to work cooperatively with our California counterparts on a voluntary basis if possible, but if we get into a mandatory program, then our main objective is to assure that the mandatory program has complete procedural safeguards and that, to pick up a phrase from Congressman Calvert, it is a kind of tax and we want to make sure that it is taxation with representation, and it is to the representation part that we are predominantly concerned, because if the representation continues to be dominated domestically, but the volume in the market, majority comes from imports, then there has to be a procedural safeguard in the regulation to meet

constitutional muster. I think that allows for a switch-over in the constitution of the controlling board.

Mr. CONDIT. I think this is correct. In 1996, you had similar oppositions to the Kiwi Fruit Promotion Program; is that correct?

Mr. HOLZWORTH. We had similar opposition and then we worked with the California Kiwi Fruit Commission to resolve most of the issues.

Mr. CONDIT. You are not opposed to that now? It is working now?

Mr. HOLZWORTH. The California Kiwi Commission has not yet decided to ask for a referendum on that particular program, and the program, as you know, doesn't go into effect until there is a referendum of the producers and growers. We are working cooperatively with California Kiwi Fruit Commission, though, on a voluntary basis, as we are with the California Avocado Commission.

Mr. CONDIT. Mr. Wolk, could you just be, I think you probably did this, but if you could just, for the panel, give us a specific explanation of how tho collection process works, the charges that this is done unfairly to the Chileans, if you could just tell us, in a short term, how it works collecting the fee.

Mr. WOLK. Yes, I read the Chilean testimony. They allege that there is an advantage to a California producer because of the time line to pay the assessment, because it is a producer assessment, and the mechanism is such that that simply is not true. When a California producer delivers his fruit to the packing house, the California producer never sees the money that is paid to the assessment. The handler keeps the money out of the payment to the producer. In fact, I would argue that the offshore producer has a greater advantage because there is a time line before the money is taken out of their money. So the statement that the California producer would get an advantage on the interest of the money of their assessment is simply not true.

Mr. CONDIT. Thank you. Mr. Chairman, that concludes my questioning to the panel.

Mr. POMBO. Mr. Dooley.

Mr. DOOLEY. As a cosponsor of the legislation, I am very supportive of its intent and objectives, but I do have some concerns that I would like to get ironed out, I guess, in terms of some of the concerns that the Chilean exporters brought up. And I guess, you know, as a farmer who participates in some of these mandatory marketing programs, I think it has to be mandatory, but how do you respond to—I think one of the concerns has some relevance in terms of if we are having the importers pay a mandatory fee, we have a board which is going to be, for all intents and purposes, controlled by domestic producers. And you have this counter-cyclical selling of avocados, obviously, Chilean are going to come in the opposite time of the year.

How do we assure there is equity in terms of the contributions that are being made by the importers are going to be invested in a manner in which they are going to see a commensurate return on their contributions? What assurances can we give to them that, you know, that these dollars aren't going to be spent primarily to promote California Hass avocados, and there is really not going to be the assurance that the investment they are making into the fees is going to be used in the off-season for the domestic product?

Mr. WOLK. Well, I don't know of any other way to say this, but I fear that they don't understand market development. We have gone through this with them but just spending California money. When we looked at spending a little bit over here and the crop would go down and the value would go up, and we wouldn't spend any money, and we have been extremely successful to many of the other boards because we work on building demand year round, and it doesn't make any difference whether it is Chilean avocados, Mexican avocados, California avocados.

You are successful when you have a steady program that builds not only consumer demand, but consumer demand with value. And just to illustrate that point, one of the measures of market success is what they call household penetration, how many households in the United States consume avocados. And in 1988, our penetration was a little bit over 32 percent.

In the late 1990's, 1997 and 1998, we have been consistently over 40 percent. Two of those years had 42 percent of household penetration of people consuming Hass avocados, and so to say that, or to look at it that offshore money would be spent when their fruit are coming in the market is actually to their detriment. You have to focus and orchestrate a program that builds consumer demand with value over time and that works for everybody.

Mr. DOOLEY. I understand that, but I guess I am little bit worried about a precedent as one who is a very strong advocate of expanding trade. If we go down this path, let us use Mexico as an example, and we export a significant amount of beef or pork into Mexico, Mexico producers of pork or beef producers decide they want to put a mandatory assessment program, also requiring fees by U.S. imports into that area, they put together a board in Mexico that is dominated by domestic producers, and they also have the ability to ensure that the promotion of all beef sold in Mexico by this board that has been put up could be done under also a State of origin, this is Mexican product and yet it is being funded by a lot of dollars that are coming in because of U.S. exports into that. Are we in any jeopardy of creating a precedent with the road we are going down here?

Mr. WOLK. In my opinion, we are not, but I might defer to Mr. McLeod to answer that because he has more experience with other Federal promotion orders that I don't have, and I would defer to Mike to comment on that.

Mr. MCLEOD. Yes, Mr. Dooley, that is a fair question. The first program that ever assessed imports was a flora board program, which was enacted in 1981, which I had the pleasure of working on. At that time that was a new precedent, and so it was determined that as long as we were completely fair with imports, that there was not a trade problem, and the first principle that has to be adhered to is that the assessment rate has to be exactly the same and, of course, this bill meets that test.

Mr. DOOLEY. Mr. McLeod, did that promotion or program allow for State of origin labeling?

Mr. MCLEOD. No, it did not.

Mr. DOOLEY. So there is a fundamental difference between that and what we are proposing here in terms of that and in terms of promotion?

Mr. MCLEOD. I wouldn't characterize it a fundamental difference, but the other seven promotion programs that currently exist also assess imports, and it is true that they don't credit money back to the State and allow a reference to a State of origin. But the important point is that as long as you maintain basic fairness, which is the same rate of assessment, some representation on the board and a right to vote in the referendum, that has always been determined to meet all of our obligations of fairness.

In fact, the counsel for the Chileans mentioned our trade obligations, the national treatment issue. We researched that issue very thoroughly back in October and submitted a legal opinion to the committee and really, in order, to be in compliance with our trade obligations and not run afoul of the national treatment principle in GATT, all we have to do is to apply the same rate of assessment because, remember, these programs are not in any way regulating the sale of a commodity within the country. They are not restricting or in any way regulating the sale or distribution or transportation of the product.

So we feel that the fact that we would allow the money credited back to the State to reference California avocados is not a violation of any trade obligation that we have, and furthermore, the program is supervised by the Department of Agriculture, and they are very scrupulous in making sure that none of the assessment funds that are collected for any of these programs can make any derogatory reference to any other commodity or any other brand and that they can't violate the other provisions of the law.

So I would say that any concerns about the importer being mistreated is certainly misplaced in the Department of Agriculture and the experience we have had with them.

Mr. DOOLEY. Mr. Holzworth, if you want to respond, I think there has to be mandatory assessment in order to deal with the free rider issue, and I think that is the only way you can also ensure equity in this, but do you have some specific suggestions that, you know, in terms that could address some of these, the point we have been talking about here in terms of what could—I guess meet some of the concerns of your constituencies?

Mr. HOLZWORTH. Certainly, and we have a model, basically, for how to work this out, the experience gained in working with the California Kiwi Fruit Commission, and we also have a model on the basis of the generic authorizing language in the Agricultural Reform Act and to the extent this bill can move more toward that model which and basically, the key issues are, and I think you have hit on them, I think 85 percent of the funds under H.R. 2962 can be paid back to the State commission and can have a labeling attachment to it.

The second major point is how the votes are cast in the referendum. Most marketing orders have a volume of sales basis for waiving the votes. This one, if I am reading it correctly, has a one producer one vote rule which greatly stacks the votes in favor of the domestic producers and handlers. There is also no provision in this bill to allow for the constitution of the board to shift as the volume of sales in the marketplace shifts, either increasing domestic representation of domestic sales go up or increasing importer representation and import sales go up.

I think there are ways to work this out, and as a practical matter about 90 percent, as I understand it, of avocados from outside the United States are handled by these same companies, mostly in California, that handle California Hass avocados, and there has been a great synergy in imports and domestic sales complementing one another to build the overall market to have a continuous availability of the product, which is the key point to increasing sales from both domestics and imports as that availability, because I think if we focus on the generic legislation as a model and we deal with the representation issues and the way the referendum mechanism works, we go a long way toward making sure there is procedural fairness that will not only satisfy WTO GATT concerns, but will also satisfy legitimate concerns under the Commerce Clause and the U.S. Constitution.

Mr. DOOLEY. Thank you. I am very supportive of this legislation, but I think we need to give some attention to it, to what I would consider technical modifications that could ensure that this is, without any question, GATT compatible. I actually think it will, in the longer term issue of the Avocado Commission in putting this thing together and making sure we see this enacted into law at a very early date.

Mr. CALVERT. If the gentleman would yield, certainly I would work with you between now and the full committee markup. I hope we can move this bill hopefully as it is today and hopefully work on that at a later day. Thank you.

Mr. POMBO. Do any of the members of the committee have any additional questions of this panel?

[No response.]

Mr. POMBO. I would like to thank the witnesses for your testimony in appearing before the committee today. The record will remain open for 10 days to accept statements and any additional information that may be required for the hearing. And the hearing portion of today's proceedings is adjourned and you are dismissed.

[Whereupon, at 10:45 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

[Material submitted for inclusion in the record follows:]

STATEMENT OF CHARLEY WOLK

Mr. Chairman and members of the subcommittee: On behalf California's 6,000 avocado growers, and the California Avocado Commission, I want to commend the staff of this subcommittee and other House Agriculture Committee members, especially the staff of Rep. Calvert and Rep. Condit, who have worked so diligently over the last eight months in crafting the provisions of H.R. 2962, the Hass Avocado Promotion, Research and Information Act of 2000.

This legislation will create a national promotion, research and information program for Hass avocados that will be funded by all parties that benefit from sales of Hass avocados in the U.S. consumer market. We hear a lot about the crisis in agriculture and it is real. In the avocado sector we have been victimized by recently escalating imports, with no relief in sight other than an expanded effort to further promote domestic avocado consumption. While other commodity sectors of the U.S. agricultural economy are eligible for additional farm assistance, we know that our options are few, so at this point—the future of the U.S. avocado industry rests on H.R. 2962, as it is currently crafted.

We come to you today with this proposal aimed at creating a new mechanism for U.S. Hass avocado growers to help themselves without costing taxpayers any money. We strongly support this industry-financed promotion program for Hass avocados—a commodity that is grown commercially only in the State of California.

Like other producers who have successful national promotion programs, including those for beef, cotton, dairy, eggs, fluid milk, soybeans, pork, honey, mushrooms, and watermelons, producers of Hass avocados are seeking a new vehicle for expanding the consumer market for avocados. A nationwide promotion program would provide the avocado industry with the means to market avocados to a much wider consumer audience, and build demand at a time when the aggregate supply of avocados is rapidly increasing.

California has a long history of state marketing programs for its many diverse agricultural commodities. In fact, the avocado industry has long benefitted from an innovative state grower-funded program administered by the California Avocado Commission.

In recent years, however, increasing imports are supplying a larger share of the U.S. consumer market. In 1998, import levels reached 100 million pounds, or nearly one-third the size of U.S. avocado production. If not offset by increased demand, this rapid escalation of supply will lead to market instability. Given this dynamic, it is only fair that the cost of a national promotion program be shared fairly among importers and domestic producers.

The Hass Avocado Promotion Act is a self-help national checkoff program that will allow avocado growers to fund and operate a coordinated marketing effort to expand the domestic market. The avocado promotion program will be operated at no cost to the Federal Government and will be funded by U.S. Hass avocado growers and Hass avocado importers.

Hass avocados are an integral food source in the United States and are a valuable and healthy part of the human diet. Avocados are enjoyed by millions of persons every year for a multitude of every day and special occasions. The maintenance and expansion of existing markets and the development of new markets and uses for Hass avocados is needed to preserve and strengthen the economic viability of the domestic Hass avocado industry for the benefit of producers and the benefit of other persons marketing, processing and consuming Hass avocados.

The key elements of this avocado promotion legislation include: (1) a 12-member Hass Avocado Board comprised of both domestic producers and importers; (2) new programs for the advertising and promotion of avocados to develop new markets; (3) research on the sale, distribution, use, quality or nutritional value of avocados; (4) an up-front referendum of producers and importers during a 60-day period preceding the effective date of the Secretary of Agriculture's implementing order; and (5) an initial assessment rate on Hass avocados of 2½ cents per pound.

This legislation provides California's 6,000 Hass avocado growers with the ability to achieve together that which would not be possible alone—the establishment of a national program to enhance avocado marketing and consumption. Pooled industry resources create the potential for an impact much greater than what would be possible through a solely State-funded program.

We are well aware that the 1996 farm bill also provides an opportunity to create a commodity promotion program administratively through the U.S. Department of Agriculture. However, this approach also means that USDA officials would write the rules that must meet the needs of avocado growers.

Unfortunately, the generic promotion statute is totally subjective as to whether the Secretary of Agriculture would issue a proposed order for a new national promotion program for Hass avocados. It also is totally discretionary as to when an order would be issued, and more significantly, the order can be written to comply with the wishes of USDA officials rather than the growers and importers who would pay the assessment.

There is a fundamental problem with the generic statute that makes it inoperable for the domestic avocado industry. The statute states that with respect to an agricultural commodity produced in the United States, the assessment is to be paid by the first handlers. This is contrary to the practice of most other commodity promotion boards and the existing California state program for avocados. In these other checkoff programs, the assessment is paid by the producer, but collected and remitted by the first handler. Thus, under the principal that those who pay the assessment get the opportunity to vote in the referenda and sit on the governing board, first handlers, rather than producers, would vote in the referendum under the generic statute.

All existing fully operational commodity promotion programs have their own distinct authorizing statute. In fact, most national checkoff programs would never have been established if each commodity group had not been able to have a statute to tailored to suit its individual needs. Clearly, each agricultural commodity is unique. This is especially true in the case of Hass avocados, where all U.S. production is in one State—the State of California—and there is already in existence a very effective state promotion program. With imports of Hass avocados rapidly increasing,

and importers not contributing to the national promotion effort from which they benefit, it is vital that U.S. avocado growers have a program tailored to meet their needs.

Agricultural commodity promotion programs are a proven means of increasing market share for commodities. The Hass avocado growers in my state want to have a program that will help increase their market share of the consumer food dollar. California's Hass avocado growers have made extensive efforts over the last two years to unify the industry, which has resulted in the development of this highly supported national promotion program. The value of domestic Hass avocado production in 1999 was $329 million—a substantial market that could be even greater if properly promoted.

This national avocado promotion program is an opportunity for Congress to help an agricultural industry create increased economic activity and job opportunities, with no expenditure of tax dollars. We ask for your support in approving this important legislation.

TESTIMONY OF DAVID A. HOLZWORTH

The Chilean Exporters Association (CEA) is a trade association comprised of Chilean fruit exporting companies. The CEA's membership accounts for approximately 85 percent by volume of fresh fruit exports from Chile. In conjunction with Fedefruta, a trade association of Chilean fruit growers, CEA directs generic promotional programs worldwide for Chilean fruit. In the United States the generic promotional activities are coordinated through the Chilean Fresh Fruit Association (CFFA). During the 1998–99 shipping season, the CFFA directed the generic promotional, advertising and public relations activities to support the marketing of approximately 520,119 tons of Chilean fresh fruit in the United States. During the 1999 shipping season, 33,284 tons of Chilean Haas avocados were supported by a generic promotional program, part of which was jointly developed, with the California Avocado Commission. CFFA anticipates that the U.S. market share of Chilean Haas avocados will increase in the next few years.

The CFFA and its predecessor, the Chilean Winter Fruit Association, began voluntary generic promotional programs for Chilean fruit in 1980, and have executed a program during each shipping season since then. For the ten calendar year period from 1989 to 1999, Chilean fresh fruit and vegetables exports worldwide have increased from 831,015 tons to 1,543,508 tons. The United States market accounts for about 517,627 tons.

To achieve this phenomenal growth, the CFFA and its counterparts in other world markets have relied exclusively on voluntary contributions to fund their programs. CFFA programs have never been funded by mandatory assessments.

We oppose passage of H.R. 2962, a mandatory check-off promotion for Haas Avocados for the following five reasons:

1. The proposed mandatory promotional program is unnecessary to achieve legitimate marketing objectives;
2. The proposed mandatory promotional program would be ineffective in achieving legitimate marketing objectives;
3. The proposed mandatory promotional program is inherently biased against imported avocados;
4. The proposed mandatory promotional program violates the First Amendment and the Foreign Commerce Clause;
5. The proposed mandatory promotional program contravenes international principles of free trade embodied in the General Agreement on Tariffs and Trade;

Each of these inherent flaws in the proposed legislation is described in detail below.

1. The proposed mandatory promotional program is unnecessary to achieve legitimate marketing objectives.

Last season CFFA coordinated its promotional activities for avocados in the U.S. market with the California Avocado Commission (CAC). The CFFA and the CAC jointly developed, funded and executed a promotional program. The CFFA portion of the program was funded, on a voluntary basis because Chilean law prohibits mandatory contributions to promotional programs. The program was developed and executed on a partnership basis with both parties to the program having an equal say in the important aspects of the program. The program, as executed was successful in promoting and increasing avocado sales.

There is no substantive difference in the objectives of the voluntary program and the stated objectives of the proposed mandatory program. Both programs are intended to increase demand for avocado by generic promotion of the product. The

CFFA continues to be committed to the development and expansion of the voluntary program. In view of the success of the voluntary program in meeting its initial objectives, there is no need for a mandatory program.

2. The proposed mandatory promotional program would be ineffective in achieving legitimate objectives.

Past experience with mandatory promotional programs teaches that such programs can only be successful if a general consensus exists within the affected commodity group to participate in and support the program. No such consensus exists for the proposed order. It is an inevitable consequence that adoption of the order will lead to litigation, international trade disputes and, ultimately, failure and withdrawal of the order. In the process, substantial amounts of time and resources will be required to monitor and resolve these disputes.

The marketing objectives and the market for domestic avocado producers in the United States are not necessarily the same as the marketing objectives or the market for imported avocados.

When a board and a budget is completely controlled or dominated by domestic producers, it may be tempted to use promotional funds obtained from importers to achieve marketing objectives in the domestic season at the expense of the import season. Each marketing group should have the ability to promote their own marketing objectives appropriate to their own markets. Proportional board representation and allocated seasonal budgets based on contributions would be more likely to achieve that objective. H.R. 2962 does not contain the necessary safeguards to prevent potential misallocation or biased allocation of funds.

For example, H.R. 2962 provides for transfers of a substantial amount of revenue to the California avocado board, which is also expressly authorized to spend that revenue promoting product labeled as California avocados.

3. The proposed mandatory promotional program is inherently biased and discriminates against imported avocado.

The inherent and systematic bias of the legislation against imported avocados is evident throughout the bill, but is most obvious in the provisions for adoption of the order, composition of the board, voting procedure for adoption of assessments and subsequent referenda. These systematic biases that discriminate against imported avocados render the legislation invalid under the foreign commerce clause of the U.S. Constitution and the principles of the General Agreement on Tariffs and Trade.

In general, H.R. 2962 provides for perpetual control and dominance of the governing board by domestic producers and handlers regardless of whether such producers or handlers represent a majority of market sales.

To avoid such a potential for abuse, the generic statutory authority provision for promotional commodity orders contained in the Agriculture Reform Act at §515(b)(2)(D) requires proportional representation for domestic and imported product:

(D) Geographical Representation.—To insure fair and equitable representation of the agricultural commodity industry covered by an order, the composition of each board shall reflect the geographical distribution of the production of the agricultural commodity in the United States and the quantity or value of the agricultural commodity imported into the United States.

The composition of the proposed national Haas avocado board does not require proportional representation for imported avocado. On the contrary, the proposed order precludes proportional representation for imported avocado. On its face, the proposal is discriminatory, and therefore invalid.

The proposed regulation also deviates from the reapportionment requirement contained in section 515(b)(3) of the Agriculture Reform Act. Section 515(b)(3) requires a promotional board to be reapportioned periodically to reflect changes in distribution of production. H.R. 2962 creates a mechanism that practically perpetuates control by domestic producers regardless of how much of the market is domestically sourced.

Under H.R. 2962, the assessment on imports is collected by the U.S. Customs Service upon entry into the United States. The assessment is initially set at $0.025 per pound, and may not exceed $0.05 per pound.

This mechanism, especially in view of the stacked voting in favor of domestic producers, can operate either as a disguised tariff or as a trade barrier. The importer is required to pay the assessment before a sale is made. In other words, the importer must advance cash to pay the assessment before imported avocado can move into the channels of United States commerce. These advance charges must of necessity, be financed at additional interest cost since no sales have yet occurred to generate the revenue for payment.

The domestic producer, in contrast, may pay the assessment up to sixty days after a final sale has occurred. This mechanism means that domestic producers will have

an advantage, measured by the interest value of the funds advanced, over importers. It also means that domestic producers may default on assessments, but importers never will. Thus, any collection costs incurred by the board will be incurred solely because of domestic defaults, but the costs of collection will be spread over domestic and importer assessments.

Since the board is controlled by domestic producers, the assessment can be set at the higher end of the limit in years when returns are most favorable to domestic producers and at the lower limit in years when returns are least favorable to domestic producers. The reverse is also true. The domestic producers could set an assessment at a level that would greatly diminish returns to importers, but have little effect on their own returns.

A generic promotional program only makes sense if it can be demonstrated that the program actually increases returns to growers in excess of the burden imposed by expenditures for the promotion. There is not sufficient data from the voluntary program to show that a generic program would achieve such results.

A voluntary program, in contrast to a mandatory order, provides the foreign grower flexibility to monitor the results achieved by the program and adjust the spending accordingly. A mandatory program may have the effect of driving the foreign grower out of the market because it only diminishes returns. In that case, the assessment operates as a kind of unauthorized tariff and a barrier to international trade.

4. The proposed mandatory promotional program violates the First Amendment and the Foreign Commerce Clause.

H.R. 2962 violates the Foreign Commerce Clause of the U.S. Constitution because it discriminates against and unfairly burdens foreign commerce. The proposed order unlawfully subjects imported avocados to mandatory assessments, but without proportional representation on the board that imposes the assessments and controls the expenditure of the collected funds. Equally important, H.R. 2962 will inevitably create conflict with our trading partners.

The Foreign Commerce Clause of the U.S. Constitution authorizes Congress, not a board dominated by private citizens of one State, "[t]o regulate Commerce with foreign Nations." Article I, §8, cl. 3. The Framers of the Constitution were convinced that "in order to succeed, the New Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the states under the Articles of Confederation." *Wardair Canada, Inc.* v. *Florida Department of Revenue,* 477 U.S. 1, 9, 106 S. Ct. 2369, 91—L. Ed.2d 1 (1986), citing *Hughes* v. *Oklahoma,* 441 U.S. 322, 325–26, 99—S. Ct. 1727, 60 L. Ed. 250 (1979). Moreover, "there is evidence that the Founders intended the scope of the foreign commerce clause to be ... greater [than the scope of the interstate commerce clause]." Id. As a result, "[i]t is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny [than state restrictions burdening interstate commerce]." *South-Central Timber Development Inc.* v. *Wunnicke,* 467 U.S. 82, 100, 104 S. Ct. 2237, 81—L. Ed.2d 71 (1984). See also *Japan Line Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 446, 99 S. Ct. 1813, 60 L.Ed. 336 (1979). This principle would, of course, imply an even higher level of scrutiny when the restrictions are to be imposed by a non-governmental body dominated by interests frem a single state in competition with the imported commodity subject to regulation.

The Supreme Court has held that state and local charges affecting foreign commerce are invalid if they (1) create a substantial risk of conflicts with foreign governments or (2)—undermine the ability of the Federal Government to "speak with one voice" regulating commercial affairs with foreign states. *Japan Line,* 441 U.S. at 446–49; see also Wardair, 477 U.S. at 9; *New Orleans Steamship Ass'n* v. *Plaquemines Port, Harbor & Terminal District,* 874 F.2d 1018, 1022–23 (5th Cir. 1989), cert. denied, 110—S. Ct. 2172 (1990). The same analysis would apply to charges imposed on foreign commerce by a board composed of private citizens.

In *Japan Line,* the Supreme Court invalidated an ad valorem property tax which California political subdivisions (including the County of Los Angeles) imposed upon Japanese cargo containers used in international commerce. The Court emphasized the need for "Federal uniformity," since "[f]oreign commerce is pre-eminently a matter of national concern." 441 U.S. at 448. If the County of Los Angeles and other state political subdivisions were allowed to impose such a tax on foreign commerce, the Court reasoned, international disputes over tax apportionment formulae could arise. Foreign nations could retaliate against the state-imposed tax, burdening American commerce as a whole, not just that from California. Other states might follow California's example, thereby creating a host of inconsistent tax schemes undermining this nation's ability to regulate foreign commerce uniformly. 441 U.S. at 450–51. See also *Barclays Bank International Ltd.* v. *Franchise Tax Board,* Cal. Ct.

App. 3d (No. C003388, Nov. 30, 1990) (applying *Japan Line* and *Wardair* to invalidate California's unitary taxation of foreign multinationals as illegal under the foreign commerce clause).

The concerns which caused the Supreme Court to invalidate the California property tax in *Japan Line* apply with greater force to H.R. 2962. Though national in force and effect, H.R. 2962 would authorize a commodity group in a single state to establish controls over the importation of a commodity nationwide, essentially conferring on the California dominated board the power to control foreign commerce in the commodity.

H.R. 2962 also deviates from the standards for implementing such orders, in the future, for other fruit commodities that may be competing with avocados for market share. Federal uniformity—or, the ability of the Nation to speak with one voice in the area of foreign commerce—is destroyed by one quasi-governmental agency, a board of private citizens from a single state, vested with virtually unfettered power to act independently to discriminate against and burden foreign commerce. The undue and discriminatory burden which the avocado board could impose on imported product is clear from the radical divergence between the legislative standards set forth in Subtitle B of the Agriculture Reform Act for other commodities and the provisions of H.R. 2962 under subtitle D.

5.The proposed mandatory promotional program contravenes international principles of free trade embodied in the General Agreement on Tariffs and Trade.

H.R. 2962 violates a basic principle of the GATT, the "national treatment" provision, by treating imported product less favorably than domestic product:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

GATT Art. III:4.

Panels of international law experts, convened under the dispute settlement procedures of GATT, have frequently and vigorously applied the national treatment principle to strike down governmental or subgovernmental practices of GATT contracting parties. In United States-section 337 of the Tariff Act of 1930, Panel Report (23 November 1988), BISD 36S/———, the European Economic Community (EEC) challenged the United States' application of section 337 of the Tariff Act of 1930. The EEC contended that this provision, which provides a remedy for enforcing private intellectual property rights against imported goods, violated article III:4 because it provided more favorable procedural treatment to domestic goods. The GATT panel agreed with the EEC and struck down the U.S. law. In so doing, it stated unequivocally:

The panel noted that, as far as the issues before it are concerned, the "no less favourable" treatment requirement set out in article III: 4, is unqualified. These words are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standards, or to domestic products, under the national treatment standards of article III. The words "treatment no less favourable" in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.

Id. at 51 (emphasis added).

Perhaps the most important principle established in the Tariff Act case, was that "[i]n the panel's view enforcement procedures cannot be separated from the substantive provisions they serve to enforce." §5.10 This principle applies here, because the procedures for electing and constituting the board are inherently biased against imported commodities even though the monetary assessment is levied against domestic and foreign commodities. In the panel's words, "[i]f the procedural provisions of internal law were not covered by article III:4, contracting parties could escape the national treatment standard by enforcing substantive law, itself meeting the national treatment standard, through procedures less favorable to imported products than to like products of national origin." §5.10

In United States-Taxes on Petroleum and Certain Imported Substances ("U.S. Superfund Tax case"), Panel Report (17 June 1987), BISD 34S/136, a GATT panel again applied article III to invalidate a U.S. law which conflicted with GATT. Canada, the European Economic Community, and Mexico challenged the validity of the U.S. "superfund" tax on petroleum and certain imported substances. The U.S. conceded that it applied the tax to imported petroleum at a rate higher than that ap-

plied to the like domestic product and thus discriminated against imports. Accordingly, the panel found a prima facie case of nullification and impairment by the U.S. of its GATT obligations to other GATT contracting parties. Id. at 155. The U.S. modified its law to remove the discrimination against imports. See Omnibus Budget Reconciliation Act of 1990, Pub. Law No. 101–508.

The differential between the tax imposed on domestic and imported petroleum in the Superfund case amounted to U.S. dollar 0.0002 per litre. That differential is less than the interest effect of requiring importers to pay promotional fees cash-in-advance at the time of entry as compared to the yet-to-be-determined time and manner of collection from domestic producers.

GATT panels have likewise not hesitated to strike down discriminatory programs by subnational governments. In Canada -Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, Panel Report (22 March 1988), BISD 35S/37, a GATT panel held that discriminatory practices by Canadian provincial liquor boards violated articles II, III and XI. Similarly, in Canada-Measures Affecting Trade in Gold Coins, a GATT panel held that the province of Ontario's exemption of the Canadian maple leaf gold coin from a sales tax, while subjecting South African Krugerrands to the tax, violated article III. In both cases, the respective Canadian provinces changed or are changing their practices to conform with the GATT rulings. GATT Activities 1985 at 37 (coins) and 6 BNA Int'l Trade Rptr. 24 (Jan.—4, 1989) (liquor boards).

Just as in the Panel Reports above, H.R. 2962 constitutes an evident violation of GATT article III:4, the national treatment principle. That discrimination occurs as a result of authorizing the levy and expenditure of assessments by a private board on which imported commodities do not have proportional representation.

This discrimination is underscored by generic authority, in the Agriculture Reform Act of 1996, of fair and equitable legislative standards for mandatory promotional orders for imported commodities that are substantially different than the standards contained in H.R. 2962 for avocados. The generic standards were certainly drafted with GATT considerations in mind, whereas H.R. 2962 was evidently drafted without regard for GATT principles.

"[W]here there is an infringement of the obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification or impairment" of GATT obligations. Annex to 1979 Understanding on Dispute Settlement, BISD 26S/216, quoted in U.S. Superfund Tax case, supra Panel Report at 155. A prima facie case establishes a presumption which has "in practice operated as an irrefutable presumption." Id. at 158. Evidence attempting to justify the discriminatory action is not allowed.

In the U.S. Superfund Tax case, the U.S. conceded that it applied the tax to imported petroleum at a rate higher than that applied to the like domestic product and thus discriminated against imports. Nevertheless, the U.S. attempted to justify the discrimination by contending that the differential was so small that the commercial effects were insignificant. Id. at 140.

The panel reviewed the full GATT history on this issue, including all prior cases, and rejected the U.S. position. It refused to examine the submissions of the parties on the trade effects of the tax differential. Id. at 159. Likewise, there is no possible justification, applying GATT principles, to warrant the blatantly discriminatory representational provisions of H.R. 2962.

CONCLUSION

H.R. 2962 is unnecessary to achieve legitimate marketing objectives. It is inherently flawed in concept and could lead to abuses in execution. In general, mandatory promotional orders do not efficiently or fairly achieve legitimate marketing needs. H.R. 2962 deviates from fundamental requirements of free trade and abandons necessary procedural safeguards contained in generic legislative authority already in place.

Main Chilean Avocado Exporters
Season 1998/99 (Thousand cases)

	EXPORTER	HASS	FUERTE	BACON	PALTUDES	EDRANOL	NOT DEF.	TOTAL
1	SOC.AGRIC.COM.AGRICOM LTDA.	1,519.7	47.0					1,557.6
2	AGROCOMERCIAL QUILLOTA S.A.	841.7	38.0					880.7
3	EXPORTADORA SANTA CRUZ	550.6	41.1				1.7	593.6
4	AGRIC.Y COMERC.CABILFRUT S.A.	456.8	13.4	1.0	0.3			476.5
5	SANTIAGO COMERC.EXT.EXPORT.LTD	147.6	11.9	0.5			2.8	162.8
6	EXPORTADORA SUBSOLE S.A.	154.0	4.1				1.1	159.2
7	BENDEL FRUIT S.A.	83.5	2.5					86.0
8	US PRODEXPORT LTDA.	27.3						27.3
9	AGRO ALIMENTOS LTDA.	24.7						24.7
10	COOSEMANS CHILE LTDA.	24.4			0.0		0.1	24.5
11	PRIMA AGROTRADING LTDA.	17.5						17.5
12	LA PUNTA BERRIES S.A.	10.5	1.0					11.5
13	SOC.AGRIC.ROSALES HNOS.Y CIA.L.	10.2						10.2
14	AGRICOLA FRUCHAC	9.5						9.5
15	COMERCIAL LOS LIBERTADORES S.	8.6				0.1	0.3	9.0
16	GOODTRADING S.A.	8.8						8.8
17	TRINIDAD EXPORTS S.A.	7.1						7.1
18	VITAL BERRY MARKETING S.A.	6.2						6.2
19	FRUCENTRO S.A.	3.9						3.9
20	SOC.VALPARAISO TRADE COMPANY	3.5						3.5
21	AGROFLORIDA LTDA.	3.5						3.5
22	IMP.EXP.AYDAR LTDA.	3.4						3.4
23	FRUTICOLA VICONTO S.A.	3.3						3.3
24	ALEJANDRO INFANTE VALDIVIESO	2.8						2.8
25	CORPORA AGRICOLA S.A.	1.8						1.8
26	SOC.AGR.LA ROSA SOTRUCO S.A.	1.8						1.8
27	IMP.Y EXP.BENDEL S.A.		1.8					1.8
28	DIST.Y COM.MACRO LTDA.	1.7						1.7
29	FRIGORIFICO LAS MERCEDES	1.7						1.7
30	AGRICOLA PUNTA ARENAS LTDA.	1.7						1.7
31	ALCANTARA S.A.	1.6						1.6
32	AGRICOLA EL ROBLE LTDA.	1.6						1.6
33	COMERCIAL ROCKY S.A.	0.9						0.9
34	EXP.E INVERSIONES AGROBERRIES	0.8						0.8
35	MERCOFRUT EXPORTACIONES LTDA.	0.3						0.3
36	SERV.Y TRANSPORTES AUSTRALES						0.2	0.2
	TOTAL	3,918.5	161.9	1.5	0.5	0.1	6.2	4,088.7
	TOTAL 1997/98	2,014.4	9.2		0.3		12.5	2,027.1
	TOTAL 1996/97	1,492.3		6.6		3.2	13.1	1,515.[illegible]

[illegible]
Season 1998/99 (Thousand cases)

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COPY

NEW ZEALAND EMBASSY

TE AKA AORERE
WASHINGTON

26 April 2000

Chairman Richard Pombo
Livestock and Horticulture Subcommittee
United States House of Representatives
Washington, DC 20515

Proposed Hass Avocado Promotion, Research and Information Bill

Dear Chairman Pombo

I am writing to convey the New Zealand Government's opposition to the proposal to establish a compulsory check-off to fund the establishment of a promotion, research and consumer information programme for Hass avocados.

The New Zealand Government is of the view that such a programme should be funded by US avocado producers alone, and that imported avocados should not be subject to a compulsory levy. In that connection I wish to register my Government's endorsement of the views expressed by the New Zealand Avocado Growers Association in its separate submission to the Livestock and Horticulture Subcommittee.

The New Zealand Government is opposed in principle to any check-off scheme which would impose a compulsory levy on imported products. The Government is particularly concerned about the additional costs imposed on importers, costs which in this case would ultimately be a charge against exporting countries' avocado producers. This is contrary to the general trend and principles underpinning the World Trade Organisation - namely to reduce costs and barriers to international trade. Furthermore, with New Zealand avocado producers already paying a levy on domestic production to fund promotion within New Zealand and overseas, it is unreasonable that they should face what would effectively be a double tax, especially in circumstances where they will have little or no control over how check-off funds are disbursed. In the case of the New Zealand levy, funds collected are used to benefit the domestic industry, and are therefore collected from domestic producers only.

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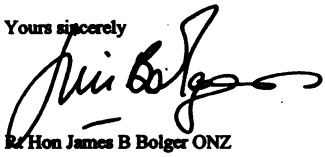
An additional concern is that funds to be generated by the proposed compulsory levy not be used for promotional activity that discriminates against the interests of exporting countries. We would consider it discriminatory, for example, if check-off funds were used for the promotion of US Hass avocados in the US, or for export development activities that included promotion of US avocados in overseas markets, possibly in competition with New Zealand avocados. Even if it could be guaranteed that importers' levies were used solely for generic promotion rather than for export development activities, domestic producers' contributions would be freed to be directed disproportionately into export development. The damaging effect on importers' interests in competing markets would be the same.

Certainly we accept that the importer representatives on the Hass Avocado Board will have some - limited - say in how the funds paid by importers are spent. However, we do not believe this provision will adequately prevent the discriminatory use of funds. It is a matter of concern to us that the proposal allows for the inclusion of only two importers on the 11 member Board. In our view this is inequitable and will not allow for the adequate representation of importers' interests.

The New Zealand Government hopes that the House Livestock and Horticulture Subcommittee and the US Department of Agriculture will ensure that funds generated by the check-off programme, if this were to proceed, are used equitably, and in a way that does not discriminate against avocado imports. In particular, we will be looking for assurances that the funds collected would be used only for the generic promotion of Hass avocados in the United States. Levies collected on imported avocados should specifically not be used to fund export development. We would also hope that in the interests of ensuring fair and equitable representation of the interests of exporting countries, adequate provision will be made in proportion to the funding provided, for exporting countries to hold positions on the Hass Avocado Board.

The New Zealand avocado industry's specific concerns about the proposed Hass Avocado Promotion, Research and Information bill are set out in the New Zealand Avocado Growers Association submission to you (a copy of which I enclose with this letter). The New Zealand Government strongly supports the Association's views, and asks that its arguments against the proposed bill be fully taken into account in the Subcommittee's deliberations on the issue.

Yours sincerely



Rt Hon James B Bolger ONZ
Ambassador

COPY

26 April 2000

Chairman Richard Pombo
Livestock and Horticulture subcommittee
United States House of Representatives
Washington, DC 20515

Fax : 202 225 6512

Proposal for a Check-off Scheme to Fund a national promotion, research and information programme for Hass avocados

Dear Chairman Pombo

I am writing formally to record the New Zealand Avocado Growers Association's opposition to the proposal to establish a check-off programme which would impose a compulsory levy on the domestic and imported Hass avocado industries to fund a Hass Avocado Promotion, Research and Information Agency (Bill no. HR 2962).

The New Zealand Avocado Growers Association (NZAGA) is an association with the sole purpose of representing New Zealand Avocado Growers and their interests. Membership of the NZAGA is voluntary and governance is by democratically elected representatives with a defined constituency. Currently, we represent approximately 800 New Zealand producers. More than 95% of New Zealand avocado growers representing more than 95% of avocado production are members of the NZAGA.

New Zealand avocado producers have exported small quantities of Hass avocados to the USA for the past 5 years. During the most recent 1999/2000 season Hass exports to the USA totaled 6 million pounds or between 1 and 2% of USA consumption.

The NZAGA opposes the passage of HR 2962, which would establish a mandatory check-off for the promotion and research of Hass avocado for the following reasons:

> The NZAGA is opposed to a compulsory levy on imported avocado. New Zealand avocado producers already pay levies on domestic production to fund promotion within New Zealand and overseas, it is unreasonable that they should face what would effectively be a double tax. As such the programme proposed under HR 2962 is unfair, discriminatory and would establish both an additional tariff and potentially a trade barrier. In New Zealand the levy is used for the promotion and

development of the New Zealand product, and is therefore, and appropriately, collected from domestic producers only. This despite the fact that avocado imports into New Zealand from other countries do occur. We contend that we benefit from imported avocados in maintaining supply in periods of domestic production shortage and being able to satisfy consumer needs in addressing choice, value and continuity of supply.

HR 2962 as is currently proposed gives one vote to each Californian grower and no vote or voice for non USA producers who are equally affected. This amounts to taxation without representation and even of more concern would allow that taxation to be used against us in the USA market or in third markets to the competitive benefit of Californian avocado growers. This amounts to a competitive subsidy.

The proposed board and budget in HR 2962 is completely controlled and dominated by domestic producers and politically is will be tempted to use promotional funds obtained from imported product to achieve marketing objectives in the domestic season to the detriment of imported product. For example HR 2962 allows for the transfer of funds to other agencies such as Californian Avocado Commission. The Commission has a stated and expressly authorised policy of promoting product labelled 'Californian Hass' avocado. We believe that HR 2962 does not address the necessary safeguards to prevent potential misallocation or seriously biased allocation of funds. We would consider it discriminatory, if for example, if check-off funds were used for the promotion of Californian avocados in California, or for export development activities that included promotion of Californian avocados in overseas markets, possibly in competition with New Zealand avocados.

Certain research activities are also possible under HR 2962. The research boundaries are not clearly defined. There is the possibility that transfer of funds to other agencies occurs such as the California Avocado Commission which also undertakes production based research could occur which would not normally have occurred in the absence of HR 2962 This could allow additional effort in areas of no benefit, or worse be discriminatory, to non domestic producers. As such we would have to be take a view that potentially aspects of HR 2962 amount to a subsidy

The HR 2962 legislation is systematically biased in terms of composition of the board, referenda and the political process. We would contend that such systematic bias renders the legislation discriminatory and flawed and is in direct opposition to the principles of the General Agreement on Tariffs and Trade. There is no attempt to balance this systematic bias with proportional representation for domestic and imported product but rather precludes proportional representation for imported avocados.

HR2962 allows State of origin (within USA only) as generic promotion but not country of origin. As "California Avocados" is essentially a brand, as evidenced by their Trade Mark, used by the Californian Avocado Commission to promote California Hass the allowance of using any of the funds collected under this order for promotion of state of origin amounts to allowing them to be used in existing branded programs and not the "increasing of general demand for Hass avocados" We strongly contend that HR2962 needs amendment to prevent funding such branded programs

Even if the importer representative were able to ensure that importers' levies were used solely for generic promotion - which would be our preference - the question of cross-subsidisation of domestic Californian producers still arises.

A minimum requirement of contributed funds is proportional input into both policy development and then secondly management as to how the promotional funds would be disbursed. This will better achieve the marketing objectives required in the USA market of consumptive growth at good value.

The New Zealand Avocado Growers Association believes that market development and promotion are necessary for medium and long-term stability as well as growth of the USA Hass Avocado market. To this end the NZAGA has always been prepared to assist with market promotion in the USA. However, we contend that this should be done voluntarily, by free association and in partnership with other interested parties. This ensures that funds collected are generating value for those who ultimately are paying and gives the producers representatives' significant, meaningful input into how their funds are spent. It would also provide an environment of trust and working together for the common goal of profitable growth of the USA Hass market.

Yours faithfully

Dr Jonathan Cutting
CEO

John White
Chairman

Diversified Avocado Products

April 24, 2000

CHRISTOPHER R. D'ARCY
Staff Director
Livestock and Horticulture Subcommittee
House Committee on Agriculture
1301 Longworth Building
Washington D.C. 20515

Dear Mr D'Arcy,

I am writing to express my opposition to legislation, introduced by Representative Ken Calvert, which would create a Hass avocado promotion board (H R 2962)

While I support the concept of creating a board to promote Hass avocados, I am concerned that Rep. Calvert's legislation unfairly promotes the California avocado industry at the expense of avocado importers such as myself. Under the provisions of this legislation, the vast majority of revenue raised from California avocado producers would remain in the state of California, while avocado importers would catty the overwhelming burden of supporting the national promotion effort . Even though Mexican avocado importers can only sell their products in nineteen states for a limited time during the year, this legislation is asking them to pay more than 75% of the money designated for the national promotion program.

Rather than crate a contentious promotion effort that may violate existing trade laws a better approach would be to create an avocado promotion board through existing authority granted to the Secretary of Agriculture. Such a board would more properly allocate assessment and ensure that fees generated from avocado importers are not used to unfairly subsidize other facets of the avocado industry.

I request that this submission be made part of the written record.

I appreciate your consideration of my concerns and hope that you will join me in opposing this misguided legislation.

Sincerely,

Emilio Guizar
President

26040 Acero, Ste. 250, Mission Viejo CA 92691 • (714) 837-5225 Fax (714) 837-6464

CALIFORNIA AVOCADO COMMISSION

SUPPLEMENTAL COMMENTS FOR THE HEARING RECORD

Subcommittee on Livestock and Horticulture
Committee on Agriculture
U.S. House of Representatives
Washington, D.C.

Hearing on H.R. 2962, the
"Hass Avocado Promotion, Research and Information Act of 2000"

April 13, 2000

Submitted by:

Charley Wolk
Chairman
California Avocado Commission
Fallbrook, California

1251 E. Dyer Road, Suite 200, Santa Ana, California 92705-5605 714/558-6761 FAX 714/641-7024

Mr. Chairman and Members of the Subcommittee:

I was privileged to appear before the subcommittee to express the views of the California Avocado Commission(CAC) on H.R. 2962, the "Hass Avocado Promotion Research and Promotion Act of 2000". However, I was appalled at some of the oral and written statements of the witness for the Chilean Fresh Fruit Association and by the written statement of the Fresh Produce Association of the Americas.

As an American farmer, I cannot help but be outraged by foreign interests who come into U.S. markets and make absurd claims to justify exemption from marketing assessments that have been paid by Americans growers for many years, to develop the domestic market for the benefit of all suppliers.

H.R. 2962 truly presents a win-win situation where everyone benefits – including both domestic producers and importers alike. The U.S. domestic market offers tremendous potential for expansion, if sufficient resources are available to develop this market, so supplies are kept in line with demand. We are confident that the return on investment will more than offset any assessment costs. In fact, an objective study conducted by the Giannini Foundation of the University of California (Research Report Number 345, July 1998) found that the "industry returns from CAC advertising and promotion expenditures ranged from a weighted average of $5.33 to $6.01 per dollar spent." Unfortunately, given the rapid increase in the volume of imports, we recognize that the market development efforts of domestic producers alone are not sufficient to ensure market stability; all participants in the market share this responsibility and all derive a benefit from increased promotional spending. Domestic producers simply do not have adequate funds to fully develop this market on their own.

Summary of Arguments

Among the claims and demands that foreign interests have suggested are the following:

(1) Importers should have the right to control the governing board of the Hass avocado promotion program.

(2) The proposed program is unnecessary and would be ineffective.

(3) The proposed program could be implemented on a voluntary basis instead.

(4) The proposed program violates the U.S. Constitution (and in the case of Chile, violates Chilean law).

(5) The proposed program violates the General Agreement on Tariffs and Trade.

(6) USDA's generic statute should be used to establish an avocado promotion program.

(7) A conspiracy theory – any federal avocado promotion program would be inherently biased against imports.

In response to these criticisms, one member of the subcommittee expressed concern that we would be setting a precedent for other countries to impose an assessment on our agricultural exports to fund programs in their countries. To that concern I say I hope so! If we can get other countries to treat our farm exports as fairly as we treat imports in this legislation, we would be ecstatic. In fact, I am sure American farmers would be happy to help foreign nations to set up promotion programs that could expand the markets for U.S. farm products, by assessing our exports at the same rate that they assess their own. However, if we made the kind of demands on their program that they are making on this program, we would be laughed at.

Let's look at these arguments.

(1) Importers should have the right to control the governing board of the Hass avocado promotion program.

Response: No group of American farmers will ever approve a promotion program for their product in their own U.S. market, if it is to be controlled by foreign interests. I doubt that Congress would ever approve a commodity promotion program that would be controlled by foreign interests. H.R. 2962 does provide for proportional representation, with the domestic growers always having at least 7 board member representatives and importers having up to 5 board representatives. This seems imminently fair, since the current levels of imports, around 30% of the market, would justify only 4 importer members.

(2) The proposed program is unnecessary and would be ineffective.

Response: To assert that a national program is unnecessary is to ignore economic reality. As imports increase, we must expand U.S. consumption of avocados or we in California as well as foreign producers will have our prices driven down to unprofitable levels. To say the proposed program would be ineffective is to deny the 20-year record of the California Avocado Commission, which built the market that foreign imports now enjoy without paying their share of marketing costs. H.R. 2962 provides for the continuation of the California program, with the additional resources at the national level that assessments on imports would make available.

(3) The proposed program could be implemented on a voluntary basis instead.

Response: The experience of the California avocado growers, as well as the experience of the all other U.S. commodity groups prove that voluntary programs do not work. This is why all of the 12 other fully operational checkoff programs are now mandatory. This fact was confirmed by us in our attempts to work with Chilean growers on a voluntary basis. We have found that promotion and advertising programs do not work unless we can be in the markets on a year-round basis. To do so, we must have an annual budget that we can count on.

(4) The proposed program violates the U.S. Constitution (and in the case of Chile, violates Chilean law).

Response: The U.S. Supreme Court settled the questions of constitutionality of promotion programs such as this in the 1997 case of Glickman v. Wileman.

(5) The proposed program violates the General Agreement on Tariffs and Trade (GATT).

Response: Foreign opponents claim that H.R. 2962 violates the "national treatment" provision of GATT. They point to specific provisions of H.R. 2962 that they object to. However, the Chilean representative made the same claim that the Kiwifruit promotion order violated GATT in a 1996 brief filed with the U.S. Department of Agriculture. This claim was made despite the fact that the Kiwifruit order did not contain the features that the Chilean interests say they most object to in the Hass avocado legislation.

In fact, the "national treatment" issue is a red herring that foreign interests appear to resort to when they have no other legitimate basis for opposing a U.S. program. It is significant to note that none of the precedents cited by the Chilean representative in his April 13 statement to the Subcommittee or his 1996 brief for USDA are even close or vaguely comparable to the provisions of H.R. 2962. When challenged, no one can ever cite a case that is comparable. This is because "national treatment" under GATT only requires that the assessment or levy on imports be the same as that for domestic product and that imports be treated as favorably as domestic products "in respect to all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." Since H.R. 2962 does not in any way regulate the sale, transportation, distribution, or use of Hass avocados and since the rate of assessment is the same for imports and domestic product , there is no way that H.R. 2962 is contrary to the "national treatment" provisions of the GATT.

(6) USDA's generic statute should be used to establish an avocado promotion program.

Response: The generic statute does not work for avocado growers. Like all of the 12 other commodity groups that have an operating promotion program, we must have a statute that is specifically tailored to our needs. The generic statute requires that assessments be paid by handlers, not growers. We must have growers pay the assessment so that they, not handlers, sit on the governing board. Equally important is the fact that growers have no real rights under the generic statute. It is totally discretionary with Department of Agriculture employees as to what kind of program they let growers have and whether growers are even permitted to have a program. Like the other 12 commodity groups who have a specific statute, we insist on having certain rights if we are to assess ourselves for a national promotion program.

(7) A conspiracy theory – any federal avocado promotion program would be inherently biased against imports.

Response: Both the Chilean statement against the avocado program and the Chilean brief against Kiwifruit program reflect a belief that any U.S. commodity promotion program is a great conspiracy against imports. This fear is also expressed in the statement submitted by importers of Mexican avocados. These fears run counter to the specific provisions of H.R. 2962 which would guarantee fair treatment to imports, such as the prohibition against disparagement of competing commodities, the prohibition against limiting the right of any person to produce, handle, or import Hass avocados, and the requirement that the law be construed to treat imports equally.

Equally as important is the fact that the entire program will be under the supervision of the Secretary of Agriculture. Contrary to the practice of other nations who use all manner of schemes and devices to keep out U.S. farm exports, we have found that USDA officials bend over backwards to be fair to importers. In fact, during our extensive discussions with USDA in reaching agreement on H.R. 2962, we have always found that USDA officials are more concerned with protecting the rights of foreign producers than U.S. producers. This inclination in favor of foreign producers is even more pronounced in the case of U.S. Trade Representative officials.

The reality is that foreign interests object to paying their fair share of building and maintaining the U.S. market for Hass avocados. As Chilean interests have made clear in their statements on the Kiwifruit order in 1996 and in their statement to this subcommittee on April 13, they are opposed to any promotion program that is mandatory. As an

American farmer, I hope that Congress will ignore the objections of foreign interests and enact legislation that will help U.S. farmers assess themselves and importers to build and maintain a sound U.S. market for avocados.

Detailed Comments on Key Issues

The following are more detailed comments on issues raised during the Subcommittee hearing, but not fully addressed during the hearing.

Importer Comments Incorrectly Directed at Earlier Version of H.R. 2962?

It is unfortunate that the comments of both the Chilean Fresh Fruit Association and the Fresh Produce Association of the Americas (FPAA) were either directed at an earlier version of H.R. 2962, rather than the substitute text that was considered and approved by the subcommittee, or they simply misread the bill.

Most significantly, it should be noted that no importer funds are sent to California growers to be used by the CAC. Both domestic producer funds and importer funds are sent to the proposed Hass Avocado Board to implement a new national promotion program. To maintain the existing national promotion program administered by the CAC, 85% of the California grower funds are credited back to California, to ensure that there is a continued national program that takes advantage of over two decades of expertise and knowledge in promoting Hass avocados in the United States.

The foreign interests are mistaken that assessments funds collected under H.R. 2962, as approved by the subcommittee, could be used to promote markets outside of the United States. H.R. 2962 creates a strictly domestic program. Also, contrary to foreign assertions that only four importer representatives would be eligible to serve on the Hass Avocado Board, H.R. 2962 is intended to provide that up to five of the 12 seats on the national Hass Avocado Board may be held by importer representatives.

The Kiwifruit Promotion Program Model Will Not Work for Hass Avocados

It is interesting that the Chilean representative would choose the Kiwifruit Promotion Program as a model the Chileans would prefer over H.R. 2962. The proposed National Kiwifruit Promotion Board would have placed a mandatory assessment on all kiwifruit sold in the United States, including imports. However, due in significant part to opposition by the Chileans, the effort to establish a new national checkoff program for kiwifruit "is currently on hold." In fact, according to the "Kiwifruit News," published by the California Kiwifruit Commission (see attached Appendix A):

> "The movement towards a national board has been taken offline for two reasons. First, the Chilean kiwifruit industry has indicated that they are still not willing to support a

mandatory program. Their representatives have indicated that they are willing to talk about voluntary efforts..., but they would ask their importers to vote against the creation of a mandatory board. Since Chile maintains roughly a fifty-percent share of the U.S. kiwifruit market, their vote against the program would make it very hard to win in a referendum."

Thus, it is somewhat disingenuous for the Chilean representative at the hearing on H.R. 2962 to argue that his clients would like to see the Kiwifruit promotion program used as a model, when the fact of the matter is that the Chileans would oppose any mandatory promotion program, including any modified version of H.R. 2962, which would continue to be a mandatory program regardless of how it were amended.

H.R. 2962 is Consistent with the National Treatment Provisions of the GATT

We take issue with any allegations that H.R. 2962 is somehow inconsistent with the national treatment obligations under Article III of the General Agreement on Tariffs and Trade (GATT 1994). Provisions of H.R. 2962 relating to importer representation on the Hass Avocado Board are clearly consistent with U.S. requirements under the GATT obligations to provide national treatment to imported products. It was suggested by the Chilean representative that the U.S. Congress should consider granting a controlling interest in a U.S. commodity promotion program to foreign interests, so the proposed national Hass Avocado Board could eventually be made up of more importer representation than domestic producers. There is no precedent for providing foreign interests majority authority over a domestic program, and it is difficult to fathom that any of our trading partners would ever allow U.S. agricultural producers to sit on boards to promote imports into their countries.

After a close examination of the proposed composition of the board, and the provisions of the GATT, we have concluded that the board representation provisions in H.R. 2962 do not violate U.S. GATT obligations to provide imports with national treatment (national treatment requires that once product is imported, it should be treated no less favorably than domestic product).

The key feature of the national treatment provisions is the requirement that assessments or levies on domestic products and imported product be the same. Thus, it is critical to note that H.R. 2962 assesses imported Hass avocados the same amount that is assessed on domestic production. This assessment rate is initially 2.5 cents per pound as set forth in Section 5(h)(2)(A).

In addition to ensuring a fair level of assessment, national treatment provisions require fairness in regulations on the distribution, purchase, sale, transportation and use of imported products, so they are treated the same as domestically-produced products. No provisions in H.R. 2962 interfere with the distribution, purchase, sale, transportation or use of imported Hass avocados. In fact, H.R. 2962 specifically prohibits any regulations on "the right of any person to produce, handle or import Hass avocados."

An example of violation of national treatment, would be a country that limits the sale of imported product into certain grocery stores or supermarkets. H.R. 2962 contains no such provisions, nor any provisions that are vaguely analogous.

There is no provision in the GATT that requires any importer representation on a U.S. commodity promotion board. To introduce our own democratic principles of equal representation and "no taxation without representation" into the GATT is not required by its terms and many of the GATT signatories do not share these principles. There is nothing in the GATT which suggests that any levies, taxes, or charges of any kind require equal representation of importers on bodies administering these levies, as long as they are not in excess of charges placed on domestic products. However, out of fairness, H.R. 2962 provides that importers may be represented by as many as five members of the 12-member Hass Avocado Board. This provision for importer representation is more generous than the Honey Board provision for only four importer representatives on its 14-member promotion board (see 7 U.S.C. 4606(c)(2)). In fact, H.R. 2962 provides for importer representation proportional to the volume of imports.

In that regard, Section 5(b)(2)(A) of H.R. 2962 reads as follows:

"(A) IN GENERAL-The order shall provide that the membership of the Board shall consist of the following:

> (i) Seven members who are domestic producers of Hass avocados and are subject to assessments under the order.
>
> (ii) Two members who represent importers of Hass avocados and are subject to assessments under the order.
>
> (iii) 3 members who are domestic producers of Hass avocados and are subject to assessments under the order, or are importers of Hass avocados and are subject to assessments under the order, to reflect the proportion of domestic production and imports supplying the United States market, which shall be based on the Secretary's determination of the average volume of domestic production of Hass avocados proportionate to the average volume of imports of Hass avocados in the United States market over the previous three years."

The national treatment issue is alleged to arise under the feature of Section 5(b)(2)(A) which provides that the number of importer representatives on the Hass Avocado Board could never be greater than five, while domestic producers are ensured seven member representatives of the 12-member board.

Other existing commodity promotion programs allow for similar representation among domestic and importer representatives on such boards. As an example, the Pork Promotion Act provides that the number of domestic producers and importers that can serve as a member of the Delegate Body are based on a formula that favors a greater representation of domestic producers (see 7 U.S.C. 4806(b)). Pork Board members are nominated from those members of the Delegate

Body (7 U.S.C. 4806(g)). Similarly, the Honey Promotion Act only allows importers to serve in up to four of the 14 board member positions on the Honey Board.

Article III of the GATT 1994 provides for the national treatment of imported products in respect to internal taxes or other charges and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use (see Appendix B). Paragraph 1 provides that internal taxes and other charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products should not be applied to imported or domestic products "so as to afford protection to domestic production." The number of importer representatives on the board could be said to afford protection to domestic production only if the order were to restrict or discourage the importation of avocados. However, the Hass avocado promotion program will operate to encourage greater consumption of avocados and thus encourage importation. The assessments paid by both importers and domestic producers are exactly the same, so there is no violation of Article III of the GATT. In any event Paragraph 1 of Article III of the GATT is merely hortatory, and does not create a legal obligation.

Paragraph 2 of GATT Article III provides that the products of the territory of any WTO Member imported into the territory of any other WTO Member "shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Paragraph 2 also provides that a WTO Member shall not otherwise apply internal taxes or other internal charges to imported or domestic products "in a manner contrary to the principles set forth in paragraph 1", which means "so as to afford protection to domestic production." There is no question raised with respect to the compatibility of the board representation with paragraph 2 of Article III. Again, domestic producers and importers will pay the same assessment rate under the provisions of H.R. 2962.

Finally, paragraph 4 of GATT Article III provides that the products of the territory of any WTO Member imported into the territory of any other WTO member "shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use." The obligation created by paragraph 4 is not breached by the importer representation provisions of H.R. 2962 because such provisions do not constitute a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or uses of imported Hass avocados. These provisions do not provide less favourable treatment to imported Hass avocados than provided to domestic Hass avocados.

Under the Hass Avocado Promotion Act, and other similar commodity promotion programs that assess imports, importers help pay for the promotion of consumption of their commodities in the U.S. market. As long as importers pay the same assessment as domestic producers, there can be no argument that H.R. 2962 (the Hass Avocado Promotion Act) is somehow in violation of GATT commitments.

Credit to California Helps Maintain Successful National Promotion Program

The Chilean representative expressed concern that importer representatives do not have sufficient input over the portion of funds used by a state association for the promotion of domestic consumption. Under Section 5(h)(8) of H.R. 2962, a state association will receive a credit equal to 85% of the assessments on its Hass avocado production, which means that such funds are remitted back to the California state-administered program.

The funds that go to the California-state administered program are to be used for the same purpose as the funds used directly by the Hass Avocado Board. By promoting avocado consumption, both importers and domestic producers would benefit from expanded markets for their products. While the CAC might promote California avocados with some of the funds credited to it, the impact would be to expand consumer awareness of all avocados. It would be highly unusual for a supermarket to stock both imported and domestic avocados, because of the limited shelf space allocated to this produce item. Any consumer who is motivated to buy avocados will purchase what is available in the store as long as the product appears wholesome and appealing.

The fact that California first established a state-administered checkoff program through the CAC in 1978, means that domestic avocado growers have over two decades of experience in promoting Hass avocados on a nationwide basis. Imports from Chile and Mexico have benefitted and will continue to benefit from California's national promotion efforts. The reason is simple: imported Hass avocados from the Southern Hemisphere are available mostly during those months when California avocados are not. By increasing overall demand, the California checkoff program also increases demand for imports. Thus, the maintenance of an experienced California-based promotion program complements rather than detracts from U.S. consumption of Hass avocado imports.

There is ample precedent for domestic producers to promote their commodities on a state basis. Promotion of "California Avocados" is no different than promotion of "Wisconsin Cheese," which is not prohibited under the Dairy Promotion Program implementing legislation (7 U.S.C. 4501-4538). Pursuant to state certified programs, there is advertising of Wisconsin Cheese with funds credited to the Wisconsin program, and Real California Cheese from the California program.

In the program cited above, as well as other promotion programs, states receive a similar credit for a portion of assessment dollars that are collected. For example, the pork checkoff program requires domestic producers and importers to remit assessments to the National Pork Board, which in turn distributes a percentage of the net assessments to the various states (7 U.S.C. 4809(c)). The distribution to each state is based on the total amount of assessments collected from that state.

In some cases, state boards certified by the Secretary of Agriculture collect assessments on behalf of the national boards. These state boards remit the assessments collected to the

national boards, less a credit as defined in the Act and Order governing the programs. In the case of the Beef Promotion Program (7 U.S.C. 2904(8)(C)), the state beef associations remit 50% of the assessments to the national board and are allowed to keep up to 50% of such funds for state promotion programs. In the case of the Fluid Milk Promotion Program, the promotion board of the state of California receives 80% of the funds collected in the state to conduct an advertising campaign. Its representation on the national board is not diminished to reflect this 80% credit.

The U.S. Department of Agriculture Scrupulously Protects Foreign Interests

Section 5(j)(1) of H.R. 2962, clearly states that no "project or program" shall "make false, misleading, or disparaging statements with respect to the attributes or use of any competing products." The provisions of H.R. 2962 explicitly prohibit the disparagement of competing commodities. Furthermore, H.R. 2962 provides in Section 12(b) the following:

> "(b) RIGHTS.–This Act–
>
> (1) may not be construed to provide for control of production or otherwise limit the right of individual Hass avocado growers, handlers and importers to produce, handle, or import Hass avocados; and
>
> (2) shall be construed to treat all personal producing, handling, and importing Hass avocados fairly and to implement any order in an equitable manner."

Thus, the legislation would prohibit discrimination against imports.

The U.S. Department of Agriculture scrupulously protects the interests of anyone affected by its programs, whether they be foreign interests or consumers. In fact, no other country would treat American growers as well as the Department of Agriculture treats foreign growers who are seeking access to the U.S. market. American agricultural producers who want to expand their exports to other markets would be astounded if they were treated so fairly by ministries of agriculture in other countries. It is difficult to imagine that U.S. agricultural interests would ever sit on other countries' promotion boards that are designed to expand the market for U.S. agricultural commodities into their markets.

Conclusions

For all of the above-referenced reasons, we find no basis for Chilean claims that the provisions of H.R. 2962 could be subject to challenge as contrary to U.S. commitments under the GATT. All funds collected under the law would have to be spent for the purposes stated in the bill, to "(1) strengthen the position of the Hass avocado industry in the domestic marketplace; and (2) maintain, develop, and expand markets and uses of Hass avocados." Thus, all funds collected, whether credited back to a state or not, must be used to enhance the market for Hass avocados in the United States to the benefit of both domestic producers and importers.

We also fail to find any basis for Chilean claims that they would support any mandatory promotion program. In fact, the Chilean statements on both the Kiwifruit promotion program and their statement on H.R. 2962 state their implacable opposition to any promotion program that is mandatory. The bottom line is that foreign producers don't want to pay for promotion from which they reap significant benefits, as long as they can get a free ride into U.S. markets.

Kiwifruit News
(Updates from the California Kiwifruit Commission)

"New commissioners elected; new commissioners needed; 1999/2000 crop update; Check-off effort on hold;

New Boards Elected. The election results are in, and both the CKC and KAC have some new members serving for the 1999/2000 season. Updated Board lists for both organizations are included with this packet of materials.

The KAC is pleased to welcome Mike Dixon (district one), Dave Dulai (district two), Joe Bonesso (district four), Donna Edgar (district six) and Juan Hernandez (district eight) to its board as committee members or alternates. The CKC welcomes back Chuck Little as commissioner in district five.

Opportunities to Serve. As you review the current CKC and KAC Board lists, you may notice that there are some vacancies. We are very interested in finding growers willing to serve on the CKC and/or KAC in the districts where vacancies exist. If you are interested, feel free to contact the CKC office or one of the representatives listed for your district.

1999/2000 Crop Outlook. Mother Nature has not been overly kind to California's kiwifruit growers this year. Having been buffeted by frost, hail, wind and rain this spring, the 1999 crop is clearly down from last year's level. At the CKC and KAC Board meetings held in early July, both boards established budgets based on an estimated crop of six million tray equivalents of kiwifruit – down from 8.5 million shipped in each of the last two seasons. The estimate will be updated at the September Board meeting of the CKC.

National Kiwifruit Promotion Board. For the past several years the CKC has been working to bring about the creation of a national generic promotion effort. The proposed National Kiwifruit Promotion Board would place a mandatory assessment on all kiwifruit sold in the United States, including all imports. Due to some recent events, this effort to establish the national Check-Off Board is currently on hold.

The movement towards a national board has been taken offline for two reasons. First, the Chilean kiwifruit industry has indicated that they are still not willing to support a mandatory program. Their representatives have indicated that they are willing to talk about voluntary efforts (perhaps the recent agreement with New Zealand provides a viable model), but that they would ask their importers to vote against the creation of a mandatory board. Since Chile maintains roughly a fifty-percent share of the US kiwifruit market, their vote against the program would make it very hard to win in a referendum.

The second sticking point has been with the projected costs of running the program. The Agricultural Marketing Service of USDA, the agency which would oversee the new National Kiwifruit Promotion Board, continues to insist that annual user fees and other costs would be in the range of $80,000 - $100,000 per year. This price is simply not acceptable to the industry, given the fact that the National Board's initial budgets would probably be no more than $1 million. It seems inequitable to have one dollar out of every ten raised go to the government for oversight. Our efforts to negotiate a more favorable fee structure have, so far, been unsuccessful.

For these reasons, the Commission has decided not to push for a referendum on the Check-Off program, and to put the effort "on hold" for the time being.

THE TEXT OF

THE GENERAL AGREEMENT ON TARIFFS AND TRADE

GATT

PART II

Article III*

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

APEAM A.C.

Asociación de Productores y Empacadores Exportadores de Aguacate de Michoacán A.C.

April 13, 2000

The Honorable Richard W. Pombo
Chairman, Livestock and Horticulture Subcommittee
House Agriculture Committee
1301 Longworth House Office Building
Washington. D.C. 20515

Re: **Statement for the Record, Hearing on H.R. 2962**

My name is Jesus Mendez-Sanchez. I am Chairman of the Board of Directors of The Mexican Avocado Growers and Exporters Association (APEAM). I am writing to express APEAM's opposition to H.R. 2962, The Hass Avocado Promotion, Research and Information Act of 2000, because it is unfair to U.S. importers and consumers, and to foreign suppliers.

I formally request that this submission be made part of the written record.

APEAM consists of more than 400 growers certified by the Mexican Government and the USDA for export to the United States, as well as 14 packinghouses with similar credentials, including several well-known U.S. multinationals, all of them engaged in the export of fresh avocados from México to tha U.S. APEAM is a private non-profit entity that, among other things guarantees payment to USDA and facilitates compliance with phytosanitary and other regulations governing the export of Mexican avocados to the U. S. market. It is a party, along with the Government of México, to several agreements with USDA.

APEAM is actively involved in issues concerning the implementation of check-off legislation and other regulations for Mexican avocados. The position of the APEAM in regard to H. R. 2962 is contained below. In general, APEAM is not opposed to check-off and promotion programs, but we strongly believe that any avocado check-off program should be implemented under the existing generic authority for check-off programs in order to prevent the potential for trade or marketing abuses and to assure that national treatment provisions in international trade agreements prevail.

Through generic promotion of a product, promotion orders, if structured fairly, can benefit all suppliers of a market, both importers and domestic. However, H.R. 2962 is unfair and discriminatory in its treatment of imports and violates World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA) provisions.

- Mexican Hass avocados are allowed into only 19 U.S. states and during only 4 months of the year. Under the bill, there is no guarantee that assessments on Mexican imports will be used exclusively to promote Hass avocados in states and during times when Mexican avocados can supply the demand. Accordingly, there is no guarantee that assessments on Mexican imports will not be used to promote avocados in states and during times when Mexican avocados could not supply the demand. Eventually, assessments on Mexican imports will unfairly subsidize the promotion of domestic avocados, or imports from other countries, in the remaining 31 states for the other 8 months of the year. This bill therefore discriminates against Mexican imports.

- An independent board is critical to assure the fair and meaningful implementation of the promotion program as well as the law providing for the program. Therefore, it is important to ensure that the membership is fairly established. Imported avocados must have proportional representation in such a board; such representation should go to the exporting (foreign) industries, in such a way that some exporters sit on the board. The board should be integrated by as many exporters and as many domestic representatives as proportional to the volume sold in the U.S. and to the aggregate amount of assessments attributable to each origin the previous season. There is at least one example where both domestic producers and foreign exporters sit on the board; it is the federal promotion order on kiwifruit.

- The representation of imported Hass avocados should go to the exporting (foreign) industries because many of the importers, actually the largest among them, are also domestic producers. All such importers have a conflict of interest. Having board members with such dual interests will contravene the purpose and intent of the law and the promotion program. Furthermore, the bill should deem a conflict of interest any situation in which any representative of imported avocados sitting on the board is also a domestic producer.

- One provision of the bill provides that the fees shall be used for "payment of costs incurred in implementing and administering the order", which includes the payment of fees to a State organization of avocado producers (i.e., California, and its California Avocado Commission). These fees equal 85% of the assessments on Hass avocados produced in such State. This is clearly unfair. First, it allows domestic producers to control 85% of their assessments, to be used as their State organization decides, in domestic promotion, research, consumer information, industry information, and administrative expenses for such programs, without allowing similar treatment for imports. Therefore, this provision is discriminatory against imports. In any event, foreign industries should have the equivalent right to implement and administer their own generic promotions in the U.S. market, and thus, the right to receive a payment similar to that allowed to domestic producers. Second, by diverting that amount of funds to a State organization, away from the national program, this provision makes the federal promotion program very weak and fragmented, which contravenes the purpose and intent of the bill. Third, if this provision remains, there should be a different and proportional representation in the national promotion board, including a reallocation of its seats, so that the number of representatives of imported avocados is increased accordingly to the 85% reduction of the funds that will be allocated to the State organization of domestic producers; the national board must have representation proportional to the source of funds which it actually will be able to use and invest.

- The discriminatory treatment set out in the bill violates the national treatment provisions of the NAFTA and of the WTO. Forcing the Mexican industry and importers to shoulder the costs of a national promotion order in light of the limited access of Mexican Hass avocados to the U.S. market, and denying the right of the Mexican Hass avocado industry and its organization (APEAM) to receive payments of costs incurred in implementing and administering generic promotion programs in the U.S. market, is discriminatory treatment. Under Article 301 of the NAFTA and Article III of the GATT, the discriminatory treatment set out in the bill violates the national treatment provisions of the NAFTA and the WTO because the Mexican Hass avocado industry and its importers are treated less favorably than domestic producers.

- According to the Agricultural Reform Act of 1996, promotion orders are implemented under a generic statute. However, this bill (H.R. 2962) does not follow that statute. Presumibly, the California avocado industry and its California Avocado Commission decided to push for a federal promotion order on Hass avocados through enabling legislation rather than the generic statute. Using the generic statute gives USDA much more oversight authority for managing the order on such matters as proportional representation; it also allows the U.S. Government to better comply with its international trade commitments. Clearly the California Avocado Commission is trying to avoid that level of USDA oversight, so that they can have much more latitude in controlling the operation of the order and its board. The Mexican avocado industry is not opposed to check-off and promotion order programs, provided that such programs and their regulations effectively prevent the potential for trade or marketing abuses. The generic statute for promotion orders seems to be a much better alternative than the H.R. 2962 bill, because this bill is more conducive to such trade and marketing abuses.

In order to promote fairness, I appreciate the consideration of our points of view by the Subcommittee on Livestock and Horticulture. I expect that the Subcommittee will not approve this misguided legislation.

Sincerely,

Jesus Mendez-Sanchez
Chairman of the Board

APEAM A.C.
Asociación de Productores y Empacadores Exportadores de Aguacate de Michoacán A.C.

HASS AVOCADO PROMOTION, RESEARCH, AND INFORMATION ACT OF 2000: THIS BILL (HR 2962/S 1790) IS UNFAIR TO US IMPORTERS AND CONSUMERS, AND TO FOREIGN SUPPLIERS.

Through generic promotion of a product, promotion orders, if structured fairly, can benefit all suppliers of a market, both importers and domestic. However, this bill is unfair and discriminatory in its treatment of imports and violates World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA) provisions.

- Mexican Hass avocados are allowed into only 19 U.S. states and during only 4 months of the year. Under the bill, there is no guarantee that assessments on Mexican imports will be used exclusively to promote Hass avocados in states and during times when Mexican avocados can supply the demand. Accordingly, there is no guarantee that assessments on Mexican imports will not be used to promote avocados in states and during times when Mexican avocados could not supply the demand. Eventually, assessments on Mexican imports will unfairly subsidize the promotion of domestic avocados, or imports from other countries, in the remaining 41 states for the other 8 months of the year. This bill therefore discriminates against Mexican imports.

- An independent board is critical to assure the fair and meaningful implementation of the promotion program as well as the law providing for the program. Therefore, it is important to ensure that the membership is fairly established. Imported avocados must have proportional representation in such a board; such representation should go to the exporting (foreign) industries, in such a way that some exporters sit on the board. The board should be integrated by as many exporters and as many domestic representatives as proportional to the volume sold in the U.S. and to the aggregate amount of assessments attributable to each origin the previous season. There is at least one example where both domestic producers and foreign exporters sit on the board; it is the federal promotion order on kiwifruit.

- The representation of imported Hass avocados should go to the exporting (foreign) industries because many of the importers, actually the largest among them, are also domestic producers. All such importers have a conflict of interest. Having board members with such dual interests will contravene the purpose and intent of the law and the promotion program. Furthermore, the bill should deem a conflict of interest any situation in which any representative of imported avocados sitting on the board is also a domestic producer.

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- One provision of the bill provides that the fees shall be used for "payment of costs incurred in implementing and administering the order", which includes the payment of fees to a State organization of avocado producers (i.e., California, and its California Avocado Commission). These fees equal 85% of the assessments on Hass avocados produced in such State. This is clearly unfair. First, it allows domestic producers to control 85% of their assessments, to be used as their State organization decides, in domestic promotion, research, consumer information, industry information, and administrative expenses for such programs, without allowing similar treatment for imports. Therefore, this provision is discriminatory against imports. In any event, foreign industries should have the equivalent right to implement and administer their own generic promotions in the U.S. market, and thus, the right to receive a payment similar to that allowed to domestic producers. Second, by diverting that amount of funds to a State organization, away from the national program, this provision makes the federal promotion program very weak and fragmented, which contravenes the purpose and intent of the bill. Third, if this provision remains, there should be a different and proportional representation in the national promotion board, including a reallocation of its seats, so that the number of representatives of imported avocados is increased accordingly to the 85% reduction of the funds that will be allocated to the State organization of domestic producers; the national board must have representation proportional to the source of funds which it actually will be able to use and invest.

- The discriminatory treatment set out in the bill violates the national treatment provisions of the NAFTA and of the WTO. Forcing the Mexican industry and importers to shoulder the costs of a national promotion order in light of the limited access of Mexican Hass avocados to the U.S. market, and denying the right of the Mexican Hass avocado industry and its organization (APEAM) to receive payments of costs incurred in implementing and administering generic promotion programs in the U.S. market, is discriminatory treatment. Under Article 301 of the NAFTA and Article III of the GATT, the discriminatory treatment set out in the bill violates the national treatment provisions of the NAFTA and the WTO because the Mexican Hass avocado industry and its importers are treated less favorably than domestic producers.

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- According to the 1996 Farm Bill, promotion orders are implemented under a generic statute. However, this bill (HR 2962) does not follow that statute. Presumibly, the California avocado industry and its California Avocado Commission decided to push for a federal promotion order on Hass avocados through enabling legislation rather than the generic statute. Using the generic statute gives USDA much more oversight authority for managing the order on such matters as proportional representation; in addition, USDA has the knowledge of U.S. international commitments such as WTO and NAFTA, and will act considering those provisions. Clearly the California Avocado Commission is trying to avoid that level of USDA oversight, so that they can have much more latitude in controlling the operation of the order and its board. The Mexican avocado industry is not opposed to check-off and promotion order programs, provided that such programs and their regulations effectively prevent the potential for trade or marketing abuses. The generic statute for promotion orders seems to be a much better alternative than the HR 2962 bill, because this bill is more conductive to such trade and marketing abuses.

Jesus Mendez-Sanchez
Chairman of the Board

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TESTIMONY OF
LIC. JULIO CESAR RUIZ FERRO
AGRICULTURE MINISTER, EMBASSY OF MEXICO
BEFORE THE HOUSE COMMITTEE ON AGRICULTURE
APRIL 14, 2000

Chairman Combest, Representative Stenholm, and Members of the Committee:

In my capacity as the Agriculture Minister of the Embassy of Mexico, I am honored to present these comments on the Hass Avocado Promotion, Research, and Information Act of 2000 to the House Subcommittee on Livestock and Horticulture. I would first like to state that Mexico is committed to working with the United States to widen the consumer market base for the promotion of Hass avocados – in the United States, Mexico and beyond.

Through generic promotion of a product, promotion orders, if structured fairly, can benefit all suppliers of a market -- both importers and domestic producers. With the 1996 Farm Bill, promotion orders are implemented under a generic statute. However, the California Avocado Commission decided to push for a federal promotion order on avocados through enabling legislation rather than the generic statute. Essentially, using the generic statute gives USDA much more oversight authority for managing the order on such matters as proportional representation. Without USDA oversight, the domestic producers have much more latitude in controlling the operation of the order and Board, thereby marginalizing the interests of both U.S. importers and U.S. consumers of Hass avocados.

This bill violates WTO rules and NAFTA provisions on national treatment and the WTO Agreement on Technical Barriers to Trade (TBT)

This bill is discriminatory in its treatment of imports in direct contravention of WTO rules and NAFTA provisions. This bill patently disregards the national treatment provisions articulated in Article III of the GATT and Article 301 of the NAFTA. Both provisions require treatment of imported goods to be "no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." In the express language of Article III:1, the general policy rationale behind the national treatment provisions of the GATT is to prevent nations from brandishing its taxes or regulations "so as to afford protection to domestic production."

This bill violates the national treatment obligation by explicitly prohibiting "any reference to private brand names" and at the same time, specifically *allowing* U.S. state of origin branding of U.S. Hass avocados, which are only produced in California. In effect, this bill authorizes U.S. state of origin promotion, but proscribes foreign origin promotion of Hass avocados. Article III of the GATT requires equal treatment of imported goods. Effectively,

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money collected from importers of foreign avocados can be used to advertise California avocados but not the other way around. By allowing the California Hass avocado industry to promote its product in the U.S. market as essentially "produced in the U.S.", the industry through labeling is instructing U.S. consumers to "Buy American", not Mexican or Chilean avocados. This bill fails to treat Mexican and Chilean Hass avocados equally with Californian Hass avocados and effectively defeats the purpose of a federal promotion order to promote *all* Hass avocados, whether Californian, Mexican or Chilean.

Additionally, the bill provides that 85% of the assessments on domestic avocados be administered by the California Avocado Commission and not by the independent board. This is blatantly unfair and violates the WTO and NAFTA. It allows domestic producers to control 85% of the assessments for domestic promotion without allowing similar treatment for imports. As a result, this legislation is asking importers to pay more than 75% of the money designated for the national promotion program. In other words, it is primarily the importers who must shoulder the burden of financing the national promotion order. To be fair and balanced, there should be a reallocation for the independent board so that the number of importers would be increased according to the 85% reduction of the assessment on domestic production. Moreover, this provision could set a bad precedent and serve for other countries to impose similar fees on american exports.

The bill also has the effect of affording protection to California Hass avocados at the expense of Mexican avocados. The discriminatory treatment set out in the bill violates the national treatment provision of the GATT because importers are treated less favorably than domestic producers. Currently, Mexican Hass avocados are allowed into only 19 U.S. states and during only four months of the year. The proposed legislation does not take this fact into account. The drafters of the bill are attempting to use the assessments as a protectionist measure to restrain imports. Under the bill, there is no guarantee that assessments on Mexican imports will not be used to promote avocados in states and during times when Mexican avocados could not supply the demand. Essentially, importers of Mexican Hass avocados will be funding domestic producers' promotion in the other 41 states for the other 8 months of the year. Forcing importers to shoulder the costs of a national promotion order in light of the limited access of Mexican Hass avocados to the U.S. market constitutes discriminatory treatment against imports.

Additionally, enactment of this bill as currently drafted will open the United States to a WTO challenge on the grounds that the United States is protecting its domestic interest by discriminating imports. Article 2.2 of the TBT Agreement mandates that each member nation should "ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."

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This bill is unfair to U.S. importers.

Currently, the bill is worded to maximize oversight and implementation authority of the promotion program to the California avocado industry, which attempts to further its interests in various ways in this proposed legislation.

First, a well-established principle with promotion orders generally is that an independent board is critical to assure the fair and meaningful implementation of the promotion program as well as the law providing for the program. Therefore, it is important to ensure that the membership is fairly established. Under the bill, seven of the 12 members are domestic producers, two members are importers, and the remaining three positions are designated on proportional representation based on volume. All of the members of the board should be on the basis of proportional representation. There is no reason to grant seven slots outright to domestic producers. Furthermore, under the bill, only three positions are subject to adjustment to take into account changes in import and production patterns. All should be subject to this adjustment on a frequent basis.

In fact, at least one exporter should sit on the board. Additionally, the enabling legislation providing for the federal promotion order on kiwifruit provides for both importers and exporters to sit on the board, in addition to domestic producers.

Second, the bill should deem a conflict of interest any situation in which importers sitting on the board are also domestic producers. In such a dual-identity scenario, with the three "swing" seats, each of the 12 seats on the board can conceivably be held by domestic producers. Having board members with such dual interests will contravene the purpose and intent of the law and the promotion program as well as silence the interests of U.S. importers and U.S. consumers.

Third, the bill provides that each importer and each producer will have one vote in the referendum of approval of the promotion order. The votes should be weighted according to volume.

Fourth, the bill states that the order will be "national in scope." The economic reality of the importer assessment is that the assessments will be transferred to the Mexican producers. To assure that the order is "national in scope" in both theory and practice, there can be an amendment providing that importer assessments will not be transferred to foreign producers or exporters.

Conclusion

We recognize that a U.S. federal avocado promotion program may lend a constructive opportunity to promote and benefit the Hass avocado industry. However, while it may appear to

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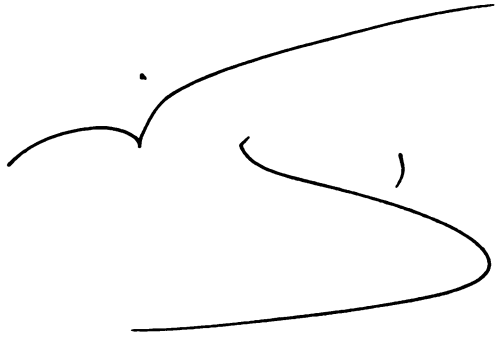
support this purpose, this bill as currently drafted is inherently defective. It is crafted to advance mainly the interests of the California avocado industry, in plain violation of international trade agreements to which the United States is beholden to uphold.

We ask that the Members of the House Agriculture Committee reject this legislation. Instead of this bill, we propose that the Mexican and other avocado producers, the importers and the California producers work together cooperatively to agree on the terms of a promotion order under the generic statute passed by the U.S. Congress in 1996.

We believe, as the Congress did when it passed the generic legislation, that the best way to reach a fair promotion order is through the generic legislation.



Fresh Directions

Statement for the Record of the
Subcommittee on Livestock and Horticulture
Committee on Agriculture
U.S. House of Representatives

Hearing on
H.R. 2962
The Hass Avocado Promotion, Research and Information Act of 2000
April 13, 2000

Submitted by
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My name is Michael Browne. I am President of Fresh Directions International (FDI), based in Ventura, California, which imports and distributes fresh fruits in the United States, Canada, Europe and Asia. Our products include avocados, mangoes, papaya and other produce. These fruits are acquired from various suppliers throughout the Americas, with our U.S. avocado imports coming from Mexico, Chile and the Dominican Republic. Our company imported more than 6.4 million pounds of Hass avocados in 1999, and is the largest U.S. importer of these products from the Dominican Republic. In addition to my duties as President of FDI, I also serve as part owner of Agroforestal MACAPI SA, the largest Hass avocado producer in the Dominican Republic with over 2,000 acres currently in production.

I wish to express strong opposition to H.R. 2962, the Hass Avocado Promotion, Research and Information Act of 2000. It is unnecessary. It would force unwarranted "fees" on importers and discriminate against imports. It would put most revenues generated by the measure under the control of a single state, California, and its avocado industry, which has a history of antagonism toward import competition. It would set a perilous precedent for other U.S. agricultural commodities and invite trade disputes, litigation and retaliatory actions by other nations.

1. AN UNNECESSARY MEASURE

If California's avocado industry were suffering, one might at least understand it turning to Washington for aid. But the fact is that the industry is thriving. The California Avocado Commission (CAC) reports that the state avocado crop "returned a record $325 million to the state's 6,000 growers in fiscal 1998/99"[1] and that "consumers are driving new demand for California avocados to an all-time high."[2] In the Southeast alone, sales "have doubled over the past five years," the CAC reports.[3]

This growing demand has been generated largely by existing California promotional and informational efforts—on TV, radio and billboards, through print advertising, database marketing and a Web site. Indeed, the CAC launched a new $4 million ad campaign in January 2000, just prior to the Super Bowl.[4] The CAC is to be commended for its skills and success in the marketing arena. The question is why it now needs Washington to collect fees from its members, only to send the money back to California to finance similar promotional, informational and research efforts? The old maxim in government as well as in industry—"If it ain't broke, don't fix it"—clearly should be applied in this case.

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[1] CAC news release, January 10, 2000

[2] CAC news release, October 24, 1999

[3] CAC news release, December 2, 1999

[4] Ibid

H.R. 2962 is also unnecessary because federal authority to promote avocados already exists in the Agricultural Reform Act of 1996. Under that statute, the U.S. Department of Agriculture (USDA) can issue an order for the generic promotion of avocados—one containing all of the elements common to similar orders for other agricultural commodities. This means, for example, that decisions regarding funding for promotional activities would be made at the national level (rather than allocated to a single state, as under H.R. 2962) and that importers would obtain proportional representation on that board (not be left in a perpetual minority, as under H.R. 2962).

The CAC, however, does not trust USDA to find that such a generic avocado order is warranted. It worries, moreover, that any USDA order would "comply with the wishes of USDA officials rather than the growers and importers who would pay the assessment."[5] I do not know what "importers" the CAC is referring to, but it certainly does not speak for our firm. We would trust USDA to make the right decision—one that complies with international trade principles and that protects the interests of importers—far more than we would trust California growers to do so.

California growers, after all, are no friends of avocado imports. On the contrary, the industry has a long protectionist history. For 83 years, for example, it used its influence to prohibit all U.S. avocado imports from Mexico, the world's largest avocado producer, a ban that was partially lifted in 1997. Mexican avocados now can be distributed, under strict quality controls, in 19 Northeastern U.S. states from November through February,[6] with our company maintaining an office in Mexico to help ensure compliance with that agreement.

2. FORCED "FEES" ON IMPORTERS

California growers may wish to have their money sent to Washington and then back to them, however unnecessary and unprecedented that arrangement might be. But they did not ask my firm if it wanted to pay the "fee." It does not, and I know of no other importer who wishes to be coerced into doing so. At $0.025 to $0.05 per pound of avocados, that would cost my firm at least $160,000 to $320,000 a year at our current levels of avocado imports and more in future years if those imports were to increase.

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[5] CAC testimony before the House Subcommittee on Livestock and Horticulture, April 13, 2000.

[6] Connecticut, Delaware, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Wisconsin.

In fact, the "fees" look more like a tariff to our company, and they would be collected in a clearly inequitable manner. Under H.R. 2962, the U.S. Customs Service would collect the assessment on imported avocados upon entry into the United States, before any final sale is made and any compensation received. Domestic producers, by contrast, would pay the assessment up to 60 days after a final sale is made. This is just one more way in which H.R. 2962 discriminates against importers.

The Californians have argued nonetheless that the promotional funds would benefit all Hass avocados. I am not persuaded, for several reasons. Among them:

- As the representative of Chile's export industry testified before your subcommittee on April 13, 2000, the California-controlled board would be "expressly authorized to spend the revenue it receives promoting produce labeled as California avocados."

- California growers could spend the promotional funds in whatever season they wished. Recall that Mexican avocados can to be sold here only in winter. However, the largest single day for consumption of avocados in the United States is May 5th—the Mexican holiday of *Cinco de Mayo*, celebrating Mexico's defeat of the French in the first battle of Puebla. California growers no doubt will concentrate considerable promotional efforts around that day, when Mexican avocados are barred from this country.

- The Californians similarly would be able to target funds at whatever markets they choose, while my firm can only import and sell Mexico's winter avocados in the Northeast.

Indeed, logic and history suggest that California growers will do everything they can to avoid promoting avocados from Chile, Mexico or elsewhere. My fellow Californians, after all, are not in the habit of helping their rivals, and it strains credulity for the CAC to suggest otherwise.

The same, of course, holds for importers: We are not devoted to aiding domestic rivals. Yet the CAC, in its April 13, 2000, testimony before your subcommittee, suggests that we should help California increase avocado demand to avoid "market instability." You will understand if I decline that invitation. Importers of automobiles are not required by U.S. law to help Michigan, importers of textiles are not required to help South Carolina, and importers of avocados should not be required to help California.

3. A PERILOUS PRECEDENT

By skirting existing USDA generic marketing-order rules and discriminating against imports and importers, H.R. 2962 would set a perilous precedent that is bound to invite trouble. In this country, other agricultural producers could seek creation of similar state-level boards, and other nations are deeply disturbed by H.R. 2962. Chile and Mexico have already gone on record as opposing it, citing violations of the First Amendment, the Foreign Commerce clause, the North American Free Trade Agreement and World Trade Organization rules. Should H.R. 2962 be enacted, chances are that it would, at a minimum, be challenged in court and in trade venues.

Moreover, foreign countries might decide to adopt similar policies for commodities of particular export interest to the United States. Mexico theoretically could decide to assess fees on U.S. soybeans, beef, apples or other commodities it imports annually to finance domestic promotion efforts that discriminate against U.S.-origin products. Or Chile could decide to implement a similar program affecting U.S. exports of wheat to that country.

There is little, if anything, to commend H.R. 2962. There is every reason to see that it does not become law.

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Written Submission

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To

Livestock and Horticulture Subcommittee
Committee on Agriculture
US House of Representatives

On

H.R. 2962
Hass Avocado Promotion, Research, and Information Act of 1999

April 13, 2000

James Cathey, Chairman
Lee Frankel, President

The Fresh Produce Association of the Americas, of Nogales, Arizona, a trade association representing the interests of American businesses involved in two-way trade of agricultural products and agricultural inputs, respectfully submits the following comments relative to H.R. 2962, Hass Avocado Promotion, Research, and Information Act of 1999, which was introduced by Rep. Ken Calvert of California.

General Comments

The Association is not in disfavor of promotional, research, and informational activities that benefit specific agricultural commodities and are funded through assessments. It is supportive of proven effective and appropriately constituted programs, such as the one for watermelons. It is, however, opposed to programs that are unfair and inequitable to those assessed to support the program. The program envisioned under H.R. 2962 is one that the Association strongly believes is greatly flawed because it fails to provide

appropriate representation to all parties and because it unquestionably favors the California Avocado Commission at the expense of all importers and other domestic growers.

Furthermore, the Association asserts that there already exists an established procedure and format at the U.S. Department of Agriculture to create promotional programs and boards. There is no need at this time to pass a separate piece of legislation to establish another promotional board. New and separate legislation, therefore, must be seen as an end-run attempt to circumvent a USDA program already established by law and which does not give unfair advantages to a small group of domestic growers.

The Association wishes to express serious concern about H. R. 2962 because the proposed legislation does not appear to provide equitable and proportional representation to importers. The legislation also does not provide for geographic and chronologic differences between domestic and imported avocados.

To be specific, the proposed composition of the Hass Avocado Board is flawed because it establishes a permanent dominance of domestic growers and handlers over importers. Even with subsequent proportional representation, the Board will always have a majority of seven domestic producers compared to a maximum of four importers.

The proposed legislation also does not take into account the geographic restrictions imposed on Mexican Hass avocado imports. Mexican Hass avocados are now allowed into only 19 Northeastern states and are forbidden in southern tier states which traditionally have been large markets for avocados.

Additionally, the proposed legislation fails to take chronologic differences into consideration. Specifically, imports of Mexican avocados are allowed only during four months in the winter. Much of the remainder of imports from other countries enter in the months when domestic production is low or non-existent.

As a matter of government policy, the Association is greatly troubled with the concept of a mandatory assessment program which will permanently bar proportional representation in the governing board.

The assessment is essentially a tax—a tax increase or a variation of a tariff imposed on imports. Needless to say, the proposed program could well serve as a precedent for other countries that might impose similar fees on American exports. The composition of the governing board and the policies of the board must be fair and equitable so that there can be no international challenges under WTO/GATT or questions of national treatment.

It should be noted that the collection of the assessment is delegated by the government to an entity (Hass Avocado Board and its contractor state avocado organization, i.e., the California Avocado Commission) that is not representative of the constituency from which it collects the tax or assessment.

Mexican avocados can be sold in only a limited number of Northeastern states during November through February. Additionally, Mexican avocados must be labeled with a country of origin sticker. That means there is a clear distinction between California and Mexican Hass avocados. There is, therefore, no reason for Mexican avocados to contribute to a year-round promotional program that blanks the nation because Mexican avocados are not sold two-thirds of the year and not in more than half of the states.

The proposed promotional program also does not make clear that it is to be a domestic program. The broad language of the proposed legislation would allow overseas promotional and marketing efforts. It would be grossly unfair to use assessments from imports to promote domestic products overseas. If an equivalent situation were to develop overseas in which foreign agricultural interests were using funds collected from American farm products to fund promotions for their products, there is no question that the US Trade Representative, not to mention the Secretary of Agriculture, would be filing one objection after another, and Members of Congress would be threatening retaliation.

Specific Comments

The Association offers the following comments on the proposed legislation, H.R. 2962 as introduced in the House in September 1999:

Sec. 2. Findings and Declaration of Policy

The proposed legislation clearly states that virtually all domestic Hass avocados are grown in California. It also makes clear that the proposed program is for the benefit of the existing Hass avocado producers, i.e., those who are in California, yet it concludes that an assessment on avocados must be imposed on imported avocados to "strengthen" and "maintain" the industry. It also says there is a need to "develop" and "expand" markets but does not limit such activities to the United States. As imports eventually may fund much of the program, overseas activities would create a clear conflict. It should be made clear that American avocado producers must use only their own funds to promote their products overseas.

Sec. 3 Definitions

Virtually all Hass avocados are grown in California; Florida does not produce the Hass variety. Imports come from a limited number of countries, including Mexico, Chile, Bahamas, Dominican Republic, New Zealand, Costa Rica, Israel, Belize, and Haiti.

Sec. 3 (5) (A) & (B) & (C) Hass Avocado.

The definition is too broad. The definition should be clearly limited to fresh, whole avocados of the Hass variety and which are imported under Harmonized Tariff Schedule of the United States 0804.40.00.00, Avocados, fresh or dried.
Processed avocados, whether frozen, pureed, cut in pieces, cooked, or otherwise not in its whole, natural state should not be included in the definition. If such forms of avocado whether domestic or imported are to be included in the assessment, then the promotion and information program should be expanded to include them. As now conceived, the promotions apparently are only for fresh avocados.

Sec. 3 (12) Promotion

The definition is too broad. The promotion program allows "any action" which could be interpreted to mean overseas promotional programs. To use assessments collected from imports for promotion of domestic avocados would be unfair, inequitable, and probably constitutes failure to provide equal, national treatment.

Sec. 5 (b) (2) Distribution of Appointments

Board membership is unfairly constituted. It has 7 domestic representatives but only 2 importer representatives, and 2 others who are subject to proportional adjustment every three years. In any event, the majority of Board members always will be from the domestic industry. There is, therefore, no proportional representation.

There is no geographical, chronological, or proportional representation, even though imports come in at different times of the year. Mexican imports, for example, can only go to 19 states during four months of the year.

Sec. 5 (b)(2)(C) Definition.

Importers are required to be a qualified handler whose "principal activity is the importation, sale, and marketing of Hass avocados." This definition could preclude importers whose business is not limited to avocados.

This definition has the potential of having a small importer qualify for Board membership while a very large importer would be disqualified by the fact that his principal activity is not the importation, sale and marketing of Hass avocados.

Sec. 5 (c)(3) General Responsibilities.

"employ such persons as the Board determines are necessary, and set the compensation and define the duties of the persons"

This provision creates what is equivalent to lifetime employment for California Avocado Commission workers since the Board will contract with that state entity.

Sec. 5. (d) (2) (A) (i) Promotion and Consumer Information.

Foreign promotion should be excluded.

Sec. 5 (d) (2) (B) Industry Information.

"plans and projects that will lead to the development of new markets, new marketing strategies"

This provision allows foreign promotion of California avocados using funds provided by imported avocados, thereby creating a situation in which imports are paying to create competition in their home country.

Sec. 5 (e) Contracts and Agreements (1) (A)

"to ensure the efficient use of funds, the order shall provide that the Board, with the approval of the Secretary, shall enter into a contract or an agreement with an avocado organization established by State statute in a State with the majority of Hass avocado production in the United States"

This provisions assures that the Californians Avocado Commission will control the Board.

Sec. 5 (h) Assessments. (1) Authority (A) In General.

"In the case of imports, the assessment shall be levied upon imports and remitted to the Board by Customs."

Sec. 5 (h) (1)(C) (iii)

"the assessment on imported Hass avocados shall be paid by the importers at the time of entry into the United States and shall be remitted to the Board."

Taken together, the provisions mean that importers are required to pay immediately when the avocados are imported, while domestic producers and handlers have up to 60 days to pay the assessment. The time difference is grossly unfair.

Sec. 5 (h) (4) Timing of Submitting Assessments.

"shall remit to the Board the assessment due from each sale of Hass avocados that is subject to an assessment within such time period after the sale (not to exceed 60 days after the end of the month in which the sale took place)"

(See above) The time difference is unfair and provides a significant "float" to the domestic industry.

Sec. 5 (h) (8) Assessment Funds for State Association.

"The order shall provide that a state association shall receive an amount equal to the product obtained by multiplying the aggregate amount of assessments attributable to the pounds of Hass avocados produced in such State by 85 percent."

There is no equivalent provision for the use of assessments on imports.

Sec. 5 (j) Prohibitions on Brand Advertising and Certain Claims. (2) Exceptions.

"a reference to State of origin does not constitute a reference to a private brand name."

There is no provision for "country of origin" which means that the Board can promote California ("State of origin") but is not required to promote the country of origin of any import.

Sec. 5 (l) Books and Records.

(1) In general. "each qualified handler, producer, and importer subject to the order shall maintain, and make available for inspection, such books and records as are required by the order and file reports"

Since importers are required to pay the assessment at the time of importation, there is no need for importers to make their books available for inspection. In view of the fact the Board will be controlled by California growers, disclosing import information will affect competition in the industry.

Sec. 5 (l)(3) (A) & (B) Lists of importers

There is no need to review lists of importers since all avocado imports by definition will be subject to the assessment.

There is no need for the Board to obtain a list of importers or to review the list..

If lists of importers are necessary, lists of domestic handlers and producers should be mandated as well.

Sec. 12. Construction. (b) Producer Right.
If "producer rights" are to be listed, then there should be an equivalent paragraph for Importer Rights. The section should state that the Act may not be construed to provide control of importation or otherwise limit the right to import Hass avocados

Sec. 12. (d) Other Programs.
Strike the words "of the United States or"
Since the promotion program mandated by the Act is generic, there should not be another Hass avocado promotion and consumer information organized and operated under the laws of the United States. A State program would be allowable, however, since imports would not be contributing to such a program.

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